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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1893—Term No. 110.

SETH E. WARD, *Plaintiff in Error*,

vs.

ELMER G. COCHRAN.

In Error to the Circuit Court of the United States for the District of Nebraska.

ABSTRACT AND BRIEF FOR PLAINTIFF IN ERROR.

JAMES HAGERMAN,
HUGH C. WARD,
Attorneys for Plaintiff in Error.

THE S. F. WOODY PTG. CO., KANSAS CITY

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ABSTRACT.

The plaintiff brings this case into this court, seeking to reverse the judgment of the court below in favor of the defendant.

The case was tried before court (Judge Dundy presiding) and jury, and the errors complained of arose in the admission and exclusion of testimony, in the refusal of the court to give a certain instruction asked by the plaintiff, and in the charge to the jury, and in the verdict.

The suit was ejectment to recover the possession of twenty acres of land, largely exceeding in value twenty thousand dollars ($20,000.00), situated in the suburbs of the City of Omaha, and described as the west one-half of the northeast one-quarter of the southwest one-quarter of Section four (4), Township fifteen (15) North, Range thirteen (13) East, in Douglass County, Nebraska.

PLEADINGS.

The petition was filed December 4, 1886, and is in the usual form, alleging that the plaintiff is a citizen of the State of Missouri, and the defendant a citizen of the State of Nebraska, and that the land exceeds in value five hundred dollars ($500.00), and that the plaintiff has a legal estate in the land, and is entitled to the possession, and that the defendant unlawfully keeps him out of the possession thereof.

The answer admits the citizenship of the parties, and that the land exceeds five hundred dollars ($500.00) in value, and the possession of the defendant, and denies that the plaintiff has a legal estate, or is entitled to the possession, and that the defendant unlawfully keeps him out of the possession.

The answer for further affirmative defense attempts to plead title in the defendant by adverse possession.

This plea of the answer is in the following language:

"And said defendant for a further defense alleges that he, the said defendant, is seized of the title, and is now in the lawful and peaceable possession of said real estate, and that he and his grantors have been in the actual, notorious, adverse and continuous possession of said real estate under claim of title for more than ten years prior to the commencement of this action. And said defendant further alleges that more than ten years have elapsed, prior to the commencement of this action, since the cause of action set forth in plaintiff's petition occurred, and said defendant charges and alleges that said plaintiff's said cause of action is fully and effectually barred by the Statute of Limitations of said State of Nebraska."

The reply of the plaintiff is a general denial of the affirmative allegations of the answer.

PLAINTIFF'S EVIDENCE.

The plaintiff showed a perfect chain of title from the United States to himself, as follows:

First. The United States Patent to Alexander R. McCandless, dated 13th of March, 1861. This patent granted the N. E. ¼ of the S. W. ¼ of Section 4, Township 15 N., Range 13 East, which included the twenty-acre tract in controversy. Rec. p. 16.

Second. Deed of Alexander R. McCandless

and dated May 2nd, 1861, to Michael Thompson, for the forty-acre tract above described, which included the twenty-acre tract in controversy. Rec. p. 17.

Third. Deed of Michael Thompson and wife, dated 5th of July, 1862, to Edward B. Taylor, for the said forty-acre tract. Rec. p. 19.

It may be observed here that the plaintiff and defendant both claim under Edward B. Taylor, as will be shown by the evidence to be hereinafter set out.

Fourth. Mortgage of Edward B. Taylor, dated July 28th, 1871, of the twenty-acre tract in controversy, to plaintiff, to secure the payment of certain promissory notes.

Fifth. The record and proceedings in suit by the plaintiff against the heirs and legal representatives of the said Edward B. Taylor, he having died in 1872, foreclosing said mortgage, and the deed of the sheriff and special commissioner of Douglass County, Nebraska, appointed under the decree in said foreclosure proceedings to make said sale. The said sheriff's deed was dated July 11th, 1877. Rec. pp. 28–39.

Sixth. The deed of Edward A. Taylor, (son and one of the heirs of Edward B. Taylor, and the only heir who was not made a party to the foreclosure proceedings), dated 25th day of June, 1885, conveying the twenty-acre tract in dispute to plaintiff. Rec. p. 57.

It was admitted that the value of the land ex-

ceeded twenty thousand dollars ($20,000). Rec. page.

The documentary evidence introduced proved plaintiff's title of record to be perfect, and the court, when the case was submitted to the jury, so charged.

DEFENDANT'S EVIDENCE.

We deem it important to set forth quite fully the evidence bearing upon the question of defendant's alleged title by adverse possession. The defendant claimed under one John Flanagan, a negro. The only documentary evidence of title introduced by the defendant was a deed of John Flanagan and wife to him of the twenty-acre tract in dispute, dated Nov. 25, 1885.

The attempt was made by the defendant to establish title in Flanagan by adverse possession. The chief witnesses in support of this claim were John Flanagan and his wife. Their testimony is so remarkable and extraordinary, strange, unintelligible and contradictory, that we have concluded that the court can only thoroughly comprehend its nature by reading it in full. This testimony is so shadowy, weak and flimsy in its character, that it is highly important that the court should thoroughly consider it. If the defence is to be sustained at all, it must be upon this testimony. We are confident that never in the history of judicial proceedings has a man been deprived of a

valuable estate by the verdict of a jury, approved by a court, on such testimony.

John Flanagan testified:—

Q. How old are you? A. I am 86 years old and going on 87. I was 62 when I left Ft. Donelson by Gen'l Garfield, Grant, and Col. Lowe.

Q. Where were you born? A. In Virginia.

Q. In slavery? A. Yes; nigger traders bought me in Richmond and brought me out South.

Q. Where did you go from there? A. A nigger trader took me to Kentucky and sold me to Senator Tyler, and afterwards I was unhealthy and he turned me back again to a nigger trader.

Q. How long did you remain in slavery?

Objected to. Sustained. Exception.

Q. When did you come to Nebraska? A. I left Ft. Donelson about the middle of March; I think it was, as far as I recollect, about the middle of March.

Q. When was that with reference to the time when Donelson was captured? A. They took Donelson in February, and I came up here in March, the same spring.

Q. And have lived in this county ever since? A. Yes, sir.

Q. You know this twenty acres of land up here? A. I ought to know it, sir.

Q. What time did you take possession of that twenty acres? A. I took it in the fall, or Mr. Taylor—I do not know exactly what day of the month it was; I do not know what year it was,

but I know Governor Saunders was governor. I do not know what date it was.

Q. State from other events, as near as you can, when you first moved on this land. A. It was in Lincoln's last term, but what time I do not know. Taylor took me out there——

Q. Do you remember who was governor of Nebraska when you moved on? A. Yes, sir.

Q. Who was governor? A. Saunders.

Q. He was governor of Nebraska? A. Yes, sir; and Mr. Dick was clerk of the court, I think, for I cleaned up his room.

Q. When you moved onto it, what did you do the first time? A. The first time I dug me a place out and made me a shanty and took my cattle out there; I had two old oxen that nobody else would have.

Q. Who went on when you got your cabin built? A. No one at all.

Q. Did you have any family? A. No, sir.

Q. What did you do there? A. I kept my cattle there and cut hay and stacked it and sold it to Thompsons and Ed. Creighton and any one that I could sell it to.

Q. What did you do in the way of cultivating it? A. I did not put anything in but a few potatoes and cabbage that season; I never put any more in until after I got married, and then I broke it.

Q. You lived in your cabin all the time by yourself? A. Yes, sir.

Q. Until you got married? A. Yes, sir; and

went out and worked around on the railroad and anywhere I could get a job chopping wood, etc.

Q. When did you get married; how long after you had been on there? A. I got married a little over a year, I think it was.

Q. Was Lincoln living when you went there? A. No.

Q. He had been killed? A. Yes; he was living when I went there; I know that Creighton tried to get me to vote for Grant afterwards.

Q. Creighton did? A. Yes, sir.

Q. When you married your wife, did you take her home there to live? A. Not right away; I stayed there with Mr. Woolworth a little while until I could get some fixed up. I had a lawsuit at that time; the same thing now. These boys took every cent I had, and then I was outdoors and could not.

Q. The lawyers took all your money? A. Yes; the lawyers and colored folks all together took my money, so I was pretty bad off, and I took her up there and we stayed until we had a bad rain, and then we got out and came back to town in old man Mills' house, and the next spring we went out there again and broke up and knocked around a little.

Q. How long was it after you first went on that land you took her over there to live and continued to live? A. I did not go there for a couple of years after that. I rented. I bought a house right by the barracks belonging to Mr. Briggs, and thought I would move it, but did not have the

money to move it; but I knocked on; and lumber was high and I went thirty miles to get cotton-wood lumber on the other side of the river—up the other side of Honey Creek station—and that took all my money, and I got sued about that, too. That very same piece of land that Seldon came and taxes. I did not know what he meant by taking my money for that. He took every cent of money I had, and he had my horses down in the stable, and I went to a lawyer about that.

Q. For the couple of years that you lived there by the barracks with your wife, what did you do with reference to this twenty acres of land? A. I cut hay every season off from it, and forbid anyone to go on, and I could not keep them off.

Q. Did your cabin still stand there? A. Yes, sir.

Q. How long was it after you first went into possession before you took your wife down there to live? A. I reckon it was about three years. I think it was. I am not certain. I think it was about three years.

Q. After you went on? A. Yes, sir; and then got rained out and a hail storm came and rained us out, and we both like to have got drowned, and I knocked around and got lumber and fixed it up, and we got along tolerably well after that. I had a large crop there and it all got washed down. I thought I was gone up. I have been there ever since.

Q. How many years have you been there on the land, occupying it with your house and family?

Objected.

Q. How many years have you been there continuously since you got kind of fixed up with your wife in the house? A. From seventeen to eighteen years or more. I could not judge nearer than that. You could count that up very easy. Her daughter has a child that gives the strict account exactly. You can go back and count from this child's age up to the time. I do not know. She knows better than I do. I do not know how many, but it is some eighteen or nineteen years.

Q. That is the lowest estimate? A. Yes, sir.

Q. During these eighteen or nineteen years what have you been doing on that property? A. I tried to keep it for grass and there was a man there.

Q. What have you been doing with it? A. I dragged it all up and planted it in corn, and they tried to run me off and I stayed. I planted it in corn and potatoes and cabbage and everything that was eatable.

Q. When you went onto the place was there any fence around this twenty acres? A. There was a fence around the whole of it—the whole forty; it was not fenced by me nor Taylor neither; it was not fenced by either one of us. I generally fixed it. Kountze fenced half of it—one side—and McCandlish fenced one side and Steve Ide fenced one side and Mr. Sahier or some of his tenants fenced the other side. When Mr. Taylor carried me up there it was all under fence, and he showed me the land.

Q. What made you take possession of the land?

Objected to as calling for a transaction between this witness and E. B. Taylor, who was deceased. Overruled. Exception. A. Mr. Taylor owed me $175.

Q. What Taylor was that? A. E. B. Taylor; he was editor.

Q. Of the Omaha Republican? A. Yes. I turned the press for him and never got a five-cent piece but that land.

Q. What talk, if any, did you have with Taylor, or what arrangement did you have with Taylor about taking this twenty acres of land? [Objected to as incompetent. Overruled and exception.] A. He took me up there and showed me the lines, him and his wife, and told me I could have that land for the money, for they were both hard up at that time and they did not want us to fall out; and I went back and whitewashed his house for him, and we never did get a cent for it. His little Ed was a little bit of a boy; he took me up on the horse and showed me the land, and I did not go onto the land, because I wanted to go away with Zahler to Virginia City. He offered me one hundred dollars a month to take his cows and take care of his dairy.

Q. What agreement did you make with Taylor as to taking this land for the money that he owed you? [Objected—for the same reasons as the last Overruled. Exception.] A. I told him I did not want the land; there was a great lake on it. I told

him I did not want it; a good deal was covered with water. I told him I did not want it, and he said, I cannot get no money, and if you do not take that land I do not know what I will do. We came home and I agreed to take it, and he asked me when I was going to build my house, and asked my wife, too, after I married her. I was not able to build any house.

Q. Was that the agreement under which you took possession? A. Yes, sir.

Q. After you took possession how long did Mr. Taylor live here before he died? A. I could not tell you exactly how long; he was here some time after that.

Q. About how long—somewhere near? A. He built a house up here, and went up here and built another one. I could not tell how long.

Q. Can you tell about how many years? A. I cannot tell you exactly how long he was living there; he was living off—for some time, because he went out on the Indian *agent* and staid out there six months or a year, and he got his bad health there and came back.

Q. During all the time that he lived here did he make any claim for the land against you? [Objected to.] A. None at all.

Q. Or ever notify you to move off? A. Nobody never made me move off but a man that had no better right than I had, and that was Elton.

Q. After you went out there under this agreement, what is the fact as to your claim to own the land all the time that you were holding it? A.

I owned the land and several people wanted to buy it, and I did not want to sell it, because I had another place and my wife wanted a home; she hated to go running around.

Q. Did you claim to own that land all the time? A. Yes; I claimed to own it the whole time, and cut hay off from it the whole time, every year.

Q. You lived on this land up to what time? A. I was living on there up to the winter before last.

Q. Up to the time that you deeded it to Cochran? A. Yes, sir.

Q. When you traded for it to him, where did you go? A. I came down on a piece that I got from Mr. French.

Q. To whom, if anybody, did you turn over the possession when you left? A. To Mr. Cochran.

Q. Is your house still on the property? A. Yes, sir.

ON CROSS-EXAMINATION.

Q. John, you say that Taylor in his lifetime owed you how much money? A. One hundred and seventy-five dollars.

Q. You do not remember the year that was in? A. I can find out the year exactly.

Q. How? A. By Judge Lake and Governor Saunders.

Q. What did they know about it? A. They came over there visiting the time I was working there.

Q. Where? A. At Taylor's.

Q. At Taylor's house? A. Yes, sir.

Q. I thought you were working at his office? A. I did; but I came there and made a fire and fed his things, too.

Q. How long? A. Four months, night and day, at $25.00 a month; that would be a hundred dollars.

Q. That made one hundred and seventy-five dollars? A. No, sir; I cut fifty cords of wood.

Q. Of his wood? A. Yes, his wood, for his house.

Q. On some of his land? A. Right in his yard. Bide Smith and Dick hauled it. We cut it up. He was to pay me one dollar a cord to cut in two twice, and he said he would give me $25.00 if I would split half of it, and that colored man helped me split it.

Q. Mr. Taylor had a good many men working in the printing office and the house? A. I do not know that he had anybody in the house but me.

Q. Did he have any hired girl? A. Yes, sir.

Q. Where? A. Right along in the house, taking care of him. She did not work very long; only a week or two at a time. I took a woman over for him that did not know a washboard from a desk; they had to put a washboard in her hand.

Q. He had a girl working at the house and a good many men working in the printing office, did he not? A. I do not know whether they were his men or not. I know there was a good many men in there.

Q. He had a printing establishment? A. Yes, sir.

Q. And edited a paper? A. Yes, sir.

Q. You were only one of a good many that worked for him? A. I worked at that printing office all night and came to the office for him every evening.

Q. He never paid you a cent for all you ever done on that land? A. Nothing only that land. He said if I did not get that I would not get anything—he would not pay me.

Q. He was hiring all these people to work for him and did not pay you? A. Yes; but he died without paying them.

Q. He built a good many houses? A. Yes, sir.

Q. To sell? A. He left all the children poor, anyhow.

Q. He was counted a pretty wealthy man in his time? A. He was, but his son had a good deal of property since this fuss was made about his children. His son got $25,000.00 or $30,000.00.

Q. What has become of it? A. You have robbed him of it; you have whittled him down like you want to whittle me.

Q. He is indebted to me for whatever he knows about it? A. I do not know. I have not had to lift a mortgage from Dick McCormick. He had $20,000.00 coming in one place and a little in another and now he is in debt, and you had this very case. You brought it, and after you brought then

you went off and got sick and then had to go and hunt—

Q. Let us go way back to Abe Lincoln's time—his running. You were talking about Mr. Taylor owing you $175.00 and said he could not pay you. A. He didn't pay me any more than that land. I did not want the land if I could have got money. If I could have got $25.00 I would have went with Zahler.

Q. The land when he gave it to you was enclosed? A. Yes; by other people.

Q. 40 acres, was not there? A. Yes, sir.

Q. A part under water? A. Yes, sir.

Q. He gave you the whole of it? A. Yes, sir.

Q. You kept the whole of it? A. No; I kept 20 acres.

Q. You raised crops on the other, too? A. Yes, I did.

Q. That was yours. The land was as much yours as the coat on your back? A. I did not think anything about it; I knowed what I knowed.

Q. You knew it was your land? A. Yes, sir.

Q. When Taylor sold 20 acres of this land to Boyd, Boyd took possession of it and divided it up into lots? A. Yes, sir.

Q. Why did you not say to Boyd that that was your land? A. I told Taylor. Taylor came to before Boyd said anything about it. He said, John, the land has gone up, and I would like to get those 20 acres and we could make money on it, and when he got it he was worse off than before.

Q. We were talking about the fact of having sold 20 acres. Boyd took possession, did not he—did he not record it and sell lots? A. No, he did not have possession; nobody has had possession still but me.

Q. Do you claim possession of Boyd's addition? A. No one has had possession but me. I rented a piece from Boyd and the water backed up on it.

Q. Boyd's addition was a part of this 40 acres that Taylor gave you? A. He did not give me no land at all.

Q. That he sold you? A. Yes, sir.

Q. He sold 40 acres and took back 20 acres? A. Yes; but he consulted with me first and would have sold the whole of it only for me, and Mr. McCormick told me—he said I could have that ten of his.

Q. You say before you went on there he explained to you and your wife that that was all you could have? A. No; I did not have any wife.

Q. What about your wife? A. That is what you have found out since.

Q. Answer my question. What did you say about his telling you and your wife? A. When my lawyer asks me I will answer.

MR. THURSTON: You must answer the question.

A. When I had her I carried her there to wash and she washed a couple of times for Taylor, and Mr. Taylor asked her when she was going to

build on the place, and she said she did not know; we did not have any money.

Q. Before you went there did he ever see your present wife about it—did she know anything about it? A. She was not in town. After I married her she went down there to work.

Q. Where was Mr. Taylor when he told you this? A. Mr. Taylor took me up to the place—him and his wife in the evening. It was dark when we got back home.

Q. Where from? A. Old Mrs. Goodall's.

Q. You were working there then? A. Yes, sir.

Q. He showed you that 40 acres and told you it was all you could have, and if you did not take that you could not have anything? A. Yes, sir.

Q. When did you take possession? A. The next spring I carried my cattle up there.

Q. You had some cattle in the meantime? A. Yes, sir; and they were stolen from me.

Q. How long had you had these? A. I could not tell you; long enough for somebody to steal them.

Q. Taylor did not give you the money to buy them? A. No, sir; because I was sawing wood around town and working for people around town night and day, and I made it every chance I got. I sawed for Governor Saunders.

Q. Did you dun Taylor for this money? A. Yes, sir.

Q. Did you threaten to sue him? A. No; I could not sue him.

Q. You took possession of this land next spring and built a house—a sod house—there? A. Yes, sir.

Q. How long did you live there then? A. I could not tell you. Off and on I stayed there all the time. I worked around on the railroad some. I worked anywhere I could get work.

Q. After you were married you brought your wife there and was drowned out? A. Yes, sir.

Q. Then where did you go? A. Up to the barracks.

Q. What year was that? A. I do not know. It was two or three years after.

Q. How long did you live there? A. A year, I believe it was.

Q. Then where did you move? A. Over—just adjoining it.

Q. Between the barracks and this tract? A. No; between this tract and the twenty acres.

Q. Who did you rent that of? A. From Dr. Denise.

Q. For how long? A. Two years.

Q. How many acres? A. One hundred and sixty, I think it was.

Q. And you lived on that tract for two years? A. Yes; nearly two years.

Q. You and your wife lived together on that? A. Yes, sir.

Q. And then went back on this? A. Yes, sir.

Q. That was about 1876, was it not? A. I do not know; about 1876.

Q. Do you remember the year that you rented from Dr. Denise? A. No, I do not.

Q. 1873 or 1874, was it not? A. I do not know exactly how long it has been; I could tell you pretty near it; I do not know exactly, but I know there was no town there at that time.

Q. Then you went back on this twenty acres? A. Yes; I cut hay on it every year and stacked my hay and kept my cattle.

Q. So did everybody else? A. No, sir.

Q. Did not Mr. Elton drive cattle over it and feed on it? A. He tried to drive, but it took three men to whip me off.

Q. In 1872 and 1873, when you were on this 160 acres? A. No, sir.

Q. Was it not a common? Did not everybody pasture their cattle there? A. No, sir.

Q. Were you the only one? A. Nobody but Elton imposed on me.

Q. When you went back there and went on the twenty acres, half of what you had originally had from Mr. Taylor was gone—sold to Boyd—half of that which you say you got from Mr. Taylor you sold to Mr. Boyd? A. That was done without my consent.

Q. He mortgaged it without your consent? A. Yes, the place I was on; but I did not leave it, all the same.

Q. How long had you been there when Housel & Allen called on you? Did they ever call on you? A. Housel & Allen never called on me.

Q. Never in the world? A. They tried to get Elton to do it.

Q. Did not Housel & Allen, one or both of them, come to your house up there? [Objected to.] A. He never said nothing to me, but other people told me that he had a tax title and Palem told me not to mind.

Q. Do you deny that Housel & Allen ever called on you as the agent of Ward and demanded the possession of that place? A. They never did in their lives.

Q. Did you ever make a lease to Housel or Allen? A. No, sir.

Objected to, and plaintiff asks that the answer be stricken out. Overruled. Plaintiff excepts.

The WITNESS: You had it and dashed it under your coat and said it was not worth that [snapping finger].

Q. Did you sign some document by which you agreed to pay rent to Housel & Allen? A. I never signed, except for a pair of old scales and cultivator. Housel & Allen never did call on me to pay me nothing. I do not know what they did want, though.

Q. Did you ever sign paper agreeing to pay Housel & Allen or either of them rent for this property? [Objected to for the reason that it purports to state the contents of a written instrument, and that the only proper way to conduct the examination is to present the paper to the witness and ask him if he had signed it. Overruled. Defendant excepts.] A. I told you I never had signed nothing at all, except for a couple of old scales.

Q. Did you ever pay to Housel & Allen, in

the way of vegetables or corn or wood, any rent for the use of the property? A. I never did since God made the world.

Q. You never paid rent to anybody? A. No, sir; to him nor nobody else.

Q. Nor Dr. Denise, did you? A. No, sir; I did not pay to Dr. Denise.

Q. Did you ever give, you or your wife, a note secured by a chattel mortgage on the goods of your wife, she being the owner of the chattels, to secure the payment of this rent to Mr. Housel or Allen?

Objected to, that part that asks what his wife done.

Q. Do you know of your wife's ever giving a note to secure this? A. I told her not to do it.

Q. Do you know of her ever having done it? A. No, sir; she did not do it.

Q. Do you remember of the gentleman named Jacob Elton? A. Yes, I ought to know him.

Q. Do you remember of his being up from Housel and Allen's, and, the rent being paid, you arranged your application for another year? A. That is a lie, and God knows it.

Q. Did you know Jacob Elton coming to you and claiming that he had leased this entire twenty acres of Ward and demanded possession? [Objected to for the reason there is nothing to show that Jacob Elton held any claim under Ward. Overruled. Plaintiff excepts.] A. I remember that he came there while I was plowing and told

me to get off from there and brought his boys to whip me off. I remember that.

Q. Do you remember of renting from him as sub-tenant for five dollars; I think it was one acre of ground where your shanty stood for a year. A. No, sir.

Q. State whether or not Mr. Elton, claiming to be the tenant of Mr. Ward, took possession of that property, with the exception of one acre that you rented. A. He never did. He took possession by trying to put me off. I never got off. It was my land and I told him to get off, and I told I would make him get off.

Q. Did he plant and raise corn on that ground? A. He kept digging after me and trying to get me off, and I told him I would make him get off when I got a lawyer to defend me.

Q. Did you rent of him one acre of that ground? A. No, sir.

Q. Did you ever pay him any rent in the way of a pig to apply on the rent? A. I never did, and he swore in court that I never did pay him any rent. He swore in court that I never did and I would not.

Q. Do you remember of coming to me and saying that a man named Elton was trying to get you off from that place?

Objected to. Withdrawn.

Q. Do you remember of going to Edward A. Taylor, a son of Edward B. Taylor—you know him don't you? A. Yes, sir.

Q. And saying to him that on examination

of the records he was a one-third owner and asking him if you could not stay there as his tenant? A. No, sir; you done that yourself.

Q. Did you do it? A. No, sir; you done it.

Q. You never spoke to Mr. Taylor about this land at all? A. No; I don't know as he was in town.

Q. After you got through with me or I with you, Mr. Elton brought another suit, did he, and you employed David Yan Etten as attorney in one or two suits, did you not—you know David Van Etten? A. Why don't you talk what you started to. I didn't know where Ed. Taylor was.

Q. Did you employ David Van Etten in one or two of those forceable-detainer suits. [Objected to as immaterial. Overruled. Plaintiff excepts.] A. Yes, I did.

Q. Did you and Mr. Van Etten in Mr. Van Etten's office propose to Ed. A. Taylor that if he would give you a quit-claim deed to this property that you would give him a portion of this land or make him your heir, or something like that? [Objected to as immaterial. Overruled. Plaintiff excepts.] A. I never did, and you know it, too.

Q. Did you ever buy or procure a quit-claim deed from Ella A. Bruner, a sister of Mr. Taylor? A. Yes, I belive I have got a deed for that. I am not certain.

Q. You are not certain? A. I know there was something said about that.

Q. Did you ever pay a cent's worth of taxes on this property? [Objected to as immaterial, ir-

relevant and not proper cross-examination. Objection overruled. Plaintiff excepts.] The WITNESS: On this twenty acres?

Mr. ESTABROOK: Yes. A. Yes; I paid $600 and something—and $80.00 the first time.

Q. On this property? A. Yes; $80 of it was taken from me by the sheriff.

Q. On this same property? A. Yes; Mr. Seldon took it and took my horse and cow in the stable.

Q. How long ago was that? A. You are too hard for me.

Q. About how long ago, as near as you remember? A. Old man Seldon.

Q. As near as you can tell? A. It has been a long time.

Q. As near as you can? A. I don't know exactly how long it has been.

Q. Five or six years? A. Yes; eight or ten years ago; it was two years after the fort was built. He took my horse and sow two years after the fort was built. I paid eighty dollars taxes on it. I didn't know what he was after, and I went to Mr. Baldwin.

Mr. THURSTON: You have been asked whether you signed papers or not. Can you read and write? A. No, I cannot.

Q. You cannot read writing at all? A. No, sir.

Q. Or reading? A. No, sir.

Q. When Mr. Taylor wanted to give that other twenty acres to Boyd and lay it off he came

and asked you about it? A. Yes; and about the first twenty, too. He told me that I might get big money for it, too, but I never got it.

(Excused.) Rec. pp. 41 to 53.

JULIA FLANAGAN, on direct examination, testified:

I am the wife of John Flanagan; have been married twenty-four years.

Q. How long after you were married to John was it that you moved onto this twenty acres where you now live—this twenty acres in dispute? A. Going onto fifteen years. I moved there with him and lived there; he had a shanty on—before he married me and some cattle, and I worked around in different places.

Q. Can you remember what year it was that you moved on there finally? A. No; I do not write or read or keep account; all I can tell is by years as they go. I don't know anything about figures.

Q. Do you remember anything else that happened about that time? A. The time the soldiers came up there to the barracks I was called up there to work, and I worked a considerable time and Mr. Flanagan worked there.

Q. How long was it after the fort was first established that you moved onto this land? A. I guess two or three years.

Q. After the fort was *fort* put there. A. Yes, sir.

Q. During these two or three years when the fort was first there, where did you first live?

A. I lived there and went from there to the barracks to works. I was sometimes out a month or two.

Q. You worked at the barracks and lived right close by there? A. Yes, sir.

Q. When you moved down onto the land was there anybody else in possession of it? A. Nobody; just our own land and dugout.

Q. John's dugout was there? A. Yes, sir.

Q. Where did you go to live first in the dugout? A. He put up a shanty; about half-way shanty. It was not secure and it came a heavy rain and we had to get out. It was not secure to keep out the rain. It was in April and we had a heavy rain and the bottom was full of water and I was obliged to get out, and then I got to work at the barracks again and worked there a long time with General Davis.

Q. How many years have you and John been living on that land continuously up to this time? A. Eight years constantly there; out only once in two or three months. I am a nurse, and when I am called out I have to go.

Q. How long is it since you and John have lived anywhere else? A. That is the last place except down on the Belt line; we have a house there; that is the only place right there with him.

Q. For how many years? A. I was there with him fourteen years. I was there before they called me out, and I would be away from home maybe three weeks.

Q. But John stayed there? A. Yes, and

sometimes he would come where I was. I could not say how long since it has been between times.

Q. During all these years who has claimed to own that twenty acres? A. Mr. Flanagan is the only one that I heard say claimed it.

Q. What has he done there during that time in the way of cultivating it and using it? A. He cuts hay and planted corn, cabbage, potatoes, and all the vegetable kind was raised there.

Q. You were not present at the time that he had the talk with Taylor? A. No, I was not present.

Q. Did you ever see Mr. Taylor out on the land before John took possession of it? A. No; I was working with Mrs. Taylor myself. A. I worked there awhile and she asked me when was John going to build; that it looked as if I had to work around and keep up the house. All that John Flanagan worked they seemed to cheat him out of, because he could not count, and it was as much as we could do to get along.

Q. You kept putting off going on there to live? A. Yes; we built a piece first, and then built a little more on top.

ON CROSS-EXAMINATION.

Q. You say that you lived there eight years constantly? A. Yes, sir.

Q. What do you mean by that? A. Without going out to work.

Q. Without moving off? A. No; without going out; I never did move off.

Q. You did not move off? A. No, sir.

Q. You always lived there? A. Yes, sir.

Q. Since you were married? A. Once I lived over by the shanty.

Q. Did you not rent the farm of Dr. Demise? A. Yes; while the water was up.

Q. Did you not farm it for a year or two? A. I did, but I was not at the farm all of the time myself. I was working up at the barracks.

Q. John was there? A. Yes, sir.

Q. You say you were there fourteen years? A. Yes, sir.

Q. What fourteen years? A. I could not say.

Q. All you know is that you were there fourteen years; can't you tell what years? A. The only way is by the children. They are all pretty nearly grown.

Q. Is that all you know of how long it is? A. I have some children of my own at that age and that is what I go by.

Q. Which one do you go by, the one that is fourteen years old? A. Yes, sir.

Q. You have been there for fourteen years last past? A. Fourteen years.

Q. You sold to Mr. Cochran in 1885, two years ago? A. I do not know the numbers. It is going on three years, I think.

Q. You have been there ever since this fourteen-year-old child was born? A. Yes, sir; off and on. I might go out and not be there all the time, but that was my home when I came home.

Q. Two years ago you sold to Mr. Cochran

did you not? A. Yes; it was fourteen years from that.

Q. That would bring it back to 1872? A. I do not know about numbers.

Q. Were you living there in 1871? A. Yes, sir.

Q. Were you living there—south of the barracks—in 1871? A. That is south of the barracks.

Q. Were you living near the barracks in 1871? A. No, sir; I was living on Dr. Demise's place.

Q. In 1871? A. Yes, sir.

Q. You swear to that, do you? A. Yes, sir.

Q. You are as positive of that as anything else you have sworn to? A. Yes; if that is—

Q. It is fourteen years from that time? A. The child is all I go by; I do not know the years.

Q. You have a child fourteen years old? A. If it figures out that way that is right. That is all I go by.

Q. You have had possession of that place all the time from that time down to this? A. Yes, sir.

Q. Did not Mr. Elton ever have possession of the land? A. No, sir.

Q. Did he ever plow it up and plant it? A. He did plow it up. He plowed up Mr. Flanagan's wheat and potatoes and plowed it against his will.

Q. Did you arrest him? A. Mr. Flanagan arrested him once.

Q. Do you swear to that? A. Yes, sir.

Q. And took him before the police? A. He was down before the court.

Q. Did you agree to pay Mr. Elton any money for the privilege of staying there one year on one acre of ground?

Objected to as irrelevant. Objection sustained. Plaintiff excepts.

Q. Did you know of John having rented it of Mr. Elton? A. No, I did not.

Q. You do not know of his having rented it from Mr. Housel and Allen? A. No, sir.

Q. Did you give a chattel mortgage on some of your property to Mr. Allen?

Objected to as immaterial and irrelevant.

Q. For the purpose of securing the rent that John agreed to pay them for the use of the property?

Objected to. Objection sustained. Plaintiff excepts.

Q. Did you ever hear John claim the title of this property or tell anybody that he owned this property? A. Yes, sir.

Q. How long ago? A. He told them at the time that he built there; Mr. Taylor was alive when he built there.

Q. Did he ever tell anybody that he owned it? A. Yes, sir.

Q. Mention one from that time down to the time that Mr. Elton commenced suit that John, in your presence, ever told that he owned it. A. He told a great many people.

Q. Mention one. A. Mr. Elton is one that he told that he owned it.

Q. Did he tell Mr. Elton that he owned it? A. Yes, sir.

Q. Anybody else? A. Yes, sir.

Q. Anybody else? A. Yes, sir; his boys all knew it; of course, they confessed it in court that John told them that he owned it.

Q. At the time that they went to take possession? A. Not at the time, but when they had court.

Q. Anybody else besides Mr. Elton? A. I do not know; I know that he had been talking all the time that he owned it. Rec. pp. 53–57.

JULIA FLANAGAN, being recalled, testified:

Q. Do you remember the fact of Mr. E. B. Taylor having died? A. I have an idea it was about fifteen years ago.

Q. Do you know whether or not he died? A. Yes, sir.

Q. Do you know about it—did you know about it at the time? A. I know when he was very sick; I know when he died.

Q. Was it before or after his death that you and John moved from the barracks down on this place? A. It was before Mr. Taylor died.

Q. Now from that time on what is the fact as to your having lived there all the time? A. That is my home.

CROSS-EXAMINATION.

Q. How do you know it was before Mr. Taylor's death that you moved down from the fort? A. I was down at Taylor's house before he died.

Q. Supposing you were? A. About a week afterwards I heard of his death. He was very sick

when I was there, and only a week afterwards I heard of his death.

Q. And the reason that you came down you were there at his house? A. I went over very often to see him.

Q. You went down from the fort there, did you not? A. Not from the barracks; I did not see Mr. Taylor. I was on Mr. Flanagan's place then.

Q. All the time you were at the barracks you never went to see Mr. Taylor, then? A. I do not know; I do not recollect. I worked at the barracks some time; that is all; one or two years before Mr. Taylor died.

Q. Before he died you were working at the barracks? A. I did and I went to see Mr. Taylor the same after I was working at the barracks.

Q. How did you know that it was before his death that you came down from the fort? A. I know that he was alive when I came down there.

Q. When you moved down to the twenty acres you know that he was alive? A. I was working for the officers' wives; my home was on the twenty acres.

Q. John was not living on the twenty acres? A. Yes, sir.

Q. At the time of Mr. Taylor's death? A. Yes, sir.

Q. You were not? A. Yes; I was there, too, but I had to go out sometimes to work.

Q. Didn't John own a couple of houses near the fort and live in one of them? A. No, sir.

Q. Didn't he rent one to Mr. Simpson? A. No; it was not his house.

Q. And collect the rents? A. No, sir; he didn't get the rent.

Q. He tried to rent it, didn't he? A. No, sir. Rec. pp. 74–75.

JOHN FLANAGAN, being recalled, testified:

Q. Do you remember E. B. Taylor's dying? A. Yes, sir.

Q. Did you know about it at the time? A. Yes, sir.

Q. When was it that you finally moved down from the barracks back onto this place—with reference to Mr. Taylor's death? Was it before or after Mr. Taylor's death? A. Before his death.

Q. Before that time, when you were away from that place, either up at the barracks or on the railroad or anywhere else, what did you do about leaving your things at the place? A. My stock was always there and everything I would have. I worked as you would work. I went around and got work wherever I could.

Q. What did you leave in the house? A. My bed, stove, and table, and my desk is there now. I never took it out.

Q. These things were in the house from the time you moved on? A. Yes, sir.

CROSS-EXAMINATION.

Q. Are all your papers in the desk now? A.

You ought to know; you had more to do with my papers than I did.

Q. When did you make up your mind? It was before Mr. Taylor's death that you moved down from the fort during the night some time? A. Maybe it was night before last.

Q. It was not suggested to you last night that you moved down before then? A. I didn't have that to think about.

Q. Was not it suggested to you by anybody? A. No, not last night.

Q. This morning—how about that? A. No; I had nothing much to do with it. About the time I went on that ground you were just born.

Q. What makes you remember it was before Mr. Taylor's death that you came down from the fort? A. I rented a room from your father when I left Taylor's house, and he had rented it to some Dane people and I could not get a room anywhere and so your mother said I could take one of the little rooms. Your father was not here and I took a room and paid her $2.00 a month, and I staid there awhile and took my cattle and went up on this place that I got of Taylor.

Q. That is the reason that you remember it was before his death that you left the fort? A. I hadn't that to think about. I had it in my possession. Mr. Taylor gave it to me.

Q. The reason that you remember it was before Taylor's death that you left the fort is because you reuted a room of my father for $2 a month. Is that the reason? A. No, sir.

Q. What makes you remember it? A. When I went over there to build my house there was nothing there, and I made a dugout, and I kept my things there at that place.

Q. Who was president when you left the fort? A. I never lived at that fort.

Q. Near the fort? A. No; I had a house outside from the fort.

Q. You had two of them? A. No, sir; I had only one building and Swader one of Burke's. I bought that of Burke.

Q. You rented the Swader house? A. I rented it out, but I never got any rent. I wish you would collect that money. Rec. pp. 75–76.

JOHN SAHLER, in substance, testified:

Have resided in Omaha, Neb., for thirty-one years and over; know the twenty-acre tract in dispute. The other twenty acres of that forty immediately east is platted as Boyd's addition. I was quite instrumental in laying out Boyd's addition in 1869 and 1870, and Flanagan lived there at that time. My wife owned the forty acres west and adjoining the twenty acres in controversy. Whenever I have been up that way I have found that Flanagan lived there, but I don't know whether he ever lived away from there or not. He used to be cutting grass, and had a garden and raised truck of that kind. I have no personal knowledge as to whether he claimed to be occupying it as the owner at the time; never talked to him on the subject.

In '69 or '70 there was a fence between the twenty-acre tract and that owned by my wife.

ON CROSS-EXAMINATION.

The fence on the west between my wife's property and the twenty acres was built by myself. It was part of the fence surrounding our property. Before the laying out of Boyd's addition, Flanagan had corn on that side of the road. I suppose in one sense of the word he occupied the whole forty. It was part and parcel of the same ground, and belonged to Col. Taylor. The house was mostly sod. It had a shingle roof. It was partially against the hill side, and Flanagan had some little barn where he kept the horse. Whenever I have been up that way I have always found him or his family about there. I don't think I have been up in that neighborhood close to look at it for the last five or six years; I have been in sight but not on the property. Don't know what kind of a building is there now, nor when it was put there. Rec. pp. 23–25.

D. P. REDMAN testified:

I have resided in Douglass County going on thirty-one years, in the vicinity of the land in controversy. Flanagan was on the land in '74. I don't know but '72 and '73. I don't know as to the time prior to that, but I think he was. He was there in '73 and '74. He was on the land cultivating it and living there, working around and raising corn and potatoes. He always claimed the land when he was talking to me. I can hardly answer the question as

to what was the understanding among the people who resided in that neighborhood, as to who owned the land. It is understood among some there that he owned the land. He claimed it and exercised action of possession and ownership over it.

ON CROSS-EXAMINATION.

I heard Flanagan say he owned it. I have heard others say he did, but I don't remember just now who they were. Rec. p. 26.

CARROLL WALTON, a negro man, testified:

I have lived in Omaha over twenty-three years. Knew Edward B. Taylor in his lifetime. Knew John Flanagan about twenty-two years ago. Know of his working for E. B. Taylor, sawing wood and working around the house. I worked with him. I went with John Flanagan to see E. B. Taylor about getting money for our work. Mr. Taylor told him he hadn't the money, and tried to get him to say he would take the land, but never heard him say he would take it. Taylor wanted him to take the land for what he had done, but I never heard Flanagan say he would take it. We were crowding Flanagan for our pay. This was over twelve months, I think about two years before Flanagan moved onto the land. After he moved there he was making hay most of the time every season. He put up a little dugout, a little sod house, and lived there. He lived some other places. There was a while he did not live on the place, but still he was claiming the place. I don't really remember what time it

was when he was away, but I know it was for a little while he was away. Flanagan and his wife moved on to stay, I think, before E. B. Taylor's death. I have been in Plattsmouth a good long time, and they might have been off. They were off a little while, but they were on most of the time. Flanagan claimed the land as his own when he went on there.

ON CROSS-EXAMINATION.

We cut fifty cords of wood owned by Mr. Taylor and he employed Flanagan to cut it. For cutting that wood he was unable to pay down, and he wanted Flanagan to take this forty acres. He was to pay a dollar a cord sawed twice in two but not split, then after he got it all sawed he hired him to split it at twenty-five cents a cord. It was about that particular job that Taylor told Flanagan to take the whole forty acres of land. Taylor was trying to get him to buy the place. He said to take that piece of land. He did not say anything about making a deed; he said, "Let me sell you that land". This conversation was at Taylor's house. Flanagan said the land was not worth that much, and Mr. Taylor told him it would be worth big money some day. I don't remember Mr. Flanagan's saying he would take it. There was nothing said about Taylor's owing him for anything else; all I heard was concerning the wood pile. Flanagan asked him for money, and he said he could not pay him and wanted him to take the land. Flanagan told Taylor that he wanted some money to pay these boys—that is, me

and two other colored men—that the other men should go and see him and did see him, and Mr. Taylor said, "John, I have not got any money; are you not going to take that land"? Rec. p. 67–69.

CHARLES CONOYER testified:

Flanagan was on the land in controversy sometime during the time when Mr. Grebe was sheriff from '70 to '74. He was making hay at that time. Subsequently I know he was cultivating it, and had on it corn two or three times, and then was cutting hay. Between '70 and '74 when I was up there he had a kind of a sod shanty. He was living there. I did not go in. I was mired with a horse and buggy near there. I have been up there three times since. Flanagan claimed the land and told me they were trying to drive him off the land. I don't know when that was. It was of late years.

ON CROSS-EXAMINATION.

It was between '70 and '74 that I was up near Flanagan's house when my horse and buggy mired. I will not swear it was in '74. Prior to that time Flanagan had been working around there. Afterwards he went down to the Dee place, and from there to the Hall, and from there up to Florence some place. Before that he was renting of Mr. Clark, and living out in the brick house on the hill near the stock yards, running a farm. Before that he was down at the Dee place on the Belleview. He then went up north. I believe I did know that he rented land of Dr. Denise. He

has farmed five or six farms that I know of. The only farms that I know of his renting was the Dee farm, the Hall farm and Clark farm, and then moving north. I know about Dr. Denise. I believe he went on the railroad to work; I don't know how long. He used to tell me his troubles and tribulations.

RE-DIRECT EXAMINATION.

I do not know of any ten years or any five years when John Flanagan retained actual possession and cultivation of that land, or any three years. Whenever I come up there I found him there. Rec. pp. 70–74.

C. A. BALDWIN testified:

Am a practicing attorney and have resided in Omaha since the 26th of July, 1868. I am personally acquainted with John Flanagan and his wife and the spot where he has lived for the last eighteen years. For the first twelve of the last eighteen years, I know he has lived on this spot up at the barracks, but for the last three or four years I have not paid any attention to it. I first went to the place in '68. He was there at that time. He was working the place in '69, '70, '71, '72 and '73, and for seven or eight years he gave me from what he grew there, corn, potatoes and hogs, and I know he was living there and claiming it as his own, but I do not know the extent of his claim. I have at my office tax receipts that passed through my hands where he paid taxes. The tax receipts show that

he paid taxes. He used to talk to me about it—that is, years ago. He paid taxes for more than ten years. I have not seen these papers for a long time, but I will bet a dollar I could find them.

ON CROSS-EXAMINATION.

I won't say that Flanagan paid taxes on the land that he was farming, because I don't know the numbers that he lived on. It is what he paid taxes on, what he supposed was his homestead—and put them in my hands, but I don't know the numbers. He did not leave it to me to pay the taxes, but in subsequent years some dispute as to title of possession arose, and he brought them to me for inspection. I inspected them. I cannot tell that I located them as being on the tract in question. I cannot tell for certain that he ever paid taxes on this particular land. I will produce the receipts, and they will show.

(N. B.—The receipts referred to by the witness were never produced.)

He used to bring pumpkins and squashes to my house for my use. I have driven up to Flanagan's house for them. I have seen them growing. I have taken crops from the fields in those days. I was glad to get something to eat, and brought it home in my buggy; potatoes dug in the field and corn picked from the growing corn, and talked with Flanagan about it. I don't know what right he had there, but he always claimed it. I am not engaged as associate counsel. The pumpkins, squashes and things that he brought to my house, I

do not know where he brought them from, only what he said. He did not in every case tell me that he brought them from this twenty acres. I do not know where he brought them from. He might have brought them from the Clark farm or the Dee place, or Dr. Denise's farm or somewhere else. I cannot state that he was on the land farming there in '67, for I was not in Nebraska. I will say that he occupied the house in '70, '71, '72 and '73 and '74 and for years after that. He was living in a house, that is my understanding—I don't see how I can be mistaken. When he worked Dr. Denise's place in '72, '73 and '74 he did not leave his homestead. The house he lived in was not exactly a dugout, it is a house. There may have been sods about it, but there was a building. I call it a sort of frame. I say from '72, '73 and '74 they made it their home there. I *think they lived there in* '71, '72, '73 and '74. I have been there. In the summer time of '71 and '72 when he went there and worked the Denise property he lived outside of the barracks in a house and kind of ranched there, but he had his home on this place all the time. He lived wherever he was when he was there. *There was no evidence about where his home was but the house.* When he was on the Denise place he planted potatoes, and I find a suit where a darkey sued him for wages on this very ground. He hired a man and the man sued him in '73 or '74—one of the hired men sued him for a day's work on the home farm. Rec. pp. 79–81.

WARREN COCHRAN, father of the defendant, testified:

Q. Are you familiar with this land in controversy? A. Yes, sir.

Q. Do you remember the time when it was transferred to your son by John Flanagan? A. It was in November, 1885.

Q. Who was in possession at that time of the purchase? A. Flanagan.

Q. What was he doing there at that time? A. He had crops on, and they were partially gathered in, but I think there was a considerable corn that was not in.

Q. What kind of a house did he have—how was he living? A. He had a little stable and lived there with his family; yes, sir.

Q. Since that time, has the property been occupied and cultivated by you and your son, or parties representing you? A. Yes; continually, and is still.

Q. Have you the original deed of Flanagan to your son? A. I have not with me; it was left with the record.

Q. The deed itself? A. Yes; I think so.

CROSS-EXAMINATION.

Q. You say this deed is taken in the name of your son. What do you mean by that? You paid the consideration for it, did you not?

Objected to as irrelevant and immaterial.

Q. Who was it that conducted the negotiations with Flanagan for the transmission of this title?

Objected to as irrelevant and immaterial and not proper cross-examination. Sustained. Plaintiff excepts.

Q. Have you ever made any overtures since the purchase of this title of Flanagan to buy the title of non-resident, Mr. Ward?

Objected to as irrelevant and immaterial and not proper cross-examination. Sustained. Plaintiff excepts.

Q. Do you know Joseph Collins? A. I have known such a man.

Q. Did you ever know him in this town? A. No, sir.

Q. Did he ever live here? A. I do not know. I know one in Vermont.

Q. Is that your handwriting (showing witness an envelope)?

Q. Is that your writing also (showing witness a letter)?

Q. You signed the name Joseph Collins to that communication, did you? A. Yes, sir.

The plaintiff offers the letter and envelope in evidence, a copy of which, in words and figures, is as follows, to-wit:

"Return to Joseph Collins, care of H. E. Cochran, 1509 Farnam st., Omaha, Nebraska, if not delivered in 10 days. Mr. Seth E. Ward, Westport, Jackson Co., Missouri."

"OMAHA, NEB., Feb'y 25, '86.

Mr. Seth E. Ward, Westport, Mo. DEAR SIR: Being a new comer in Omaha, I am looking for a piece of land of 15 or 20 acres near the city for fruit and market-garden purposes; am told you

have a piece out near the Fort, the west ½ of N. E. qr. S. W. qr., Sec. 4, T. 15, R. 13, that might answer my purpose. I write to enquire if that is so. Would you sell it and at what price? Can you give a good title and is it free from all incumbrance? Will you do me the favor to reply at once, as it is near time to commence preparing for gardening plants. I do not wish to rent. I wish to buy and pay cash. So please give me your very lowest figures. Direct to Joseph Collins, Omaha, Neb., care of H. E. Cochran, 1509 Farnam street.

"Very respectfully, JOSEPH COLLINS."

Objected to as immaterial and irrelevant and improper cross-examination. Sustained. Plaintiff excepts. See Rec. pp. 77 and 78.

Defendant introduced in evidence a deed dated the 25th day of November, 1885, duly executed by John Flanagan and Julia Flanagan, his wife, conveying by warranty deed the land in controversy to defendant. Rec. pp. 85-86.

Defendant offered in evidence over the objection of plaintiff the record and proceedings of the case of *Seth E. Ward vs. John and Julia Flanagan*, tried in the County Court of Douglas County, Nebraska, including extracts of the testimony in that case of John Flanagan, Harriett Emaline Williams, Maria G. Clark and Julia Flanagan, and also including the transcript of the proceedings in said county court in the case of *State of Nebraska vs John Flanagan*, for trespass, for the purpose of showing adverse possession in the defendant in this case and his grantors, and showing the adjudication between the parties of this suit upon

the question of possession and right of possession, a copy of which record, omitting the statement of the costs therein contained, is as follows, to-wit:

"Exhibit T."

July 2, 1885.

Now comes the complainant and by his attorney, O. H. Ballou, files the following complaint:

Before J. H. McCulloch, County Judge in and for Douglass County, Nebraska, sitting as Justice of the Peace.

COMPLAINT.

To J. H. McCulloch, County Judge in and for the County of Douglass and State of Nebraska:

The undersigned, Seth E. Ward, plaintiff doth hereby make his complaint to you against one Jacob Elton, John Flanagan and Julia Flanagan, defendants, for this:

That the said Jacob Elton and John Flanagan and Julia hath ever since the 1st day of April, A. D. 1885, and doth still unlawfully and forcibly detain from the undersigned possession of the following premises, situated in the county of Douglass and State of Nebraska, and described as follows, to-wit:

The west one-half (W. ½) of the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) of Section four (4), Township fifteen (15) north, of Range thirteen (13) east. The said Jacob Elton entered upon the premises as the tenant of the undersigned, and the said John Flanagan and Julia Flanagan as tenants of said Elton. The lease therefor with said Elton expired at the time herein first mentioned and from that time the said Jacob Elton hath unlawfully and forcibly held over his said term, and the said John Flanagan and Julia Flana-

gan hath ever since the said 1st day of April, 1885, unlawfully and forcibly held and detained the said premises from the undersigned. On the 17th day of June, A. D. 1885, the undersigned duly served upon said Julia Flanagan, as required by law, notice in writing to leave said premises, and on the 18th day of June, 1885, the undersigned duly served upon said Jacob Elton and John Flanagan, as required by law, notice in writing to leave said premises.

The undersigned asks process and restitution and costs of suit.

Dated this 1st day of July, 1885.

SETH E. WARD.
By O. H. Ballou, his Attorney.

Same day issued summons, returnable July 8, 1885, at 9 o'clock a. m.

July 6, 1885. Summons returned endorsed: "On July 3, 1885, I received this writ, and on same day, 1885, I served by delivering personally a certified copy of this writ and endorsements thereon to each of the within named, the defendants, in Douglas —, Nebraska. Fees, $2.25, paid by plaintiff.

"JOHN F. PAGE, *Constable*."

July 8, 1885: Now come the defendants John Flanagan and Julia Flanagan, by their attorneys, Van Etten & Sears, and file a motion to compel plaintiff to give security for costs.

July 9, 1885: Now comes the plaintiff, by his attorney, O. H. Ballou, and files security for costs herein.

July 8, 1885: By agreement of parties, it is ordered that this case be and the same is hereby continued until July 22, 1885, at 10 o'clock a. m.

July 22, 1885: Now come the parties and their attorneys, and the defendants demanded a jury. The following named jurors were selected according to law, viz.: Geo. B. Lake, Jr., Ewing Armstrong, Harry Westerfield, E. Wyman, C. B. Moore and James Atwood. It is therefore ordered that a venire issue for the above named jurors, returnable July 27, 1885, at 10 o'clock a. m., and that this case be and the same is hereby continued until July 27, 1885, at 10 o'clock a. m.

July 22, 1885: Issued subpœna, at request of defendant, for E. M. Sternberg, Geo. B. Lake, Sr., B. E. B. Kennedy, M. Williams, Maria Clark, Willis Porter, Joseph Redman, Michael Cody, Mick Mergen, Thom. Riley, Tom Swift and O. B. Selden.

July 27, 1885: Subpœna returned served on all except Thos. Riley, Willis Porter and M. Williams.

July 27, 1885 Venire returned endorsed: "On July 22, 1885, I received this writ and on July 25, 1885, I served by reading it to each of the within named jurors except Jas. Atwood and Ewing Armstrong, who was not found in Douglas county, Neb., as therein commanded. Fees, $2,40.

"JOHN F. PAGE, *Constable.*"

Also same day defendant John and Julia Flanagan file their separate answer herein.

And also came Jacob Elton and wholly disclaimed any interest in this action and moved to be dismissed with his costs, which motion was reserved for decision until the trial of this case: also on the

same day appeared H. A. Westerfield, C. B. Moore and Geo. B. Lake, jurors summoned herein; also A. Wyman, who, on account of sickness, was excused. On motion of the plaintiff, both parties waiving the further service of a jury and agreeing to try the case to the court, it is ordered that the jury be excused, and that this case be and the same is hereby continued until August 5, 1885, at 10 o'clock a. m.

July 27, 1885: Issued subpoena for Gustave Anderson (with docket and files) and Jacob Elton, subpoena returnable August 5, 1885, at 10 o'clock a. m.

August 5, 1885: Subpoena returned served on each of the above named witnesses by John F. Page, constable. Fees $1.35.

August 4, 1885: Issued subpoena for E. M. Stenberg (with docket and files) Geo. B. Lake, Sen., B. E. B. Kennedy, M. Williams, Maria Clarke, Willis Porter, Joseph Redman, Michael Cody, Nick Mergen, Thos. Riley, Tom Swift and O. B. Selden on part of defendants and deputized John Flanagan to serve the same.

August 5, 1885: Subpoena returned served on Willis Porter and Maria Clark, two of the above named parties, by John Flanagan.

August 5, 1885: Now come the parties and this case came on for trial to the court. The defendants moved to dismiss for want of jurisdiction, which was overruled, as was also a demurrer to the complaint was also overruled.

Reuben Allen, John F. Page, Jacob Elton were

each duly sworn and examined on behalf of the complainant. J. I. Paynter, John Kannaly, Michael Cody, O. B. Seldon, Harriet Williams, Maria G. Clarke, David Van Etten, John Flanagan and Julia Flanagan were each duly sworn and examined on behalf of the defendant. Gustave Anderson and O. H. Ballou testified in rebuttal.

After hearing the evidence and arguments of counsel, the case was taken under advisement by the court until August 8, 1885; and now on this 8th day of August, 1885, after due consideration I find that the defendants are not guilty in manner and form as charged in the complaint herein. It is therefore ordered that this complaint be and the same is hereby dismissed at the costs of the complainant, taxed at $32.20.

At the time of the rendition of the judgment the plaintiff took exception to the findings and judgment of the court and was granted until the 11th day of August to prepare his bill of exceptions.

J. H. McCulloch,
County Judge.

August, 14th, 1885: Now comes the plaintiff, by O. H. Ballou, his attorney, and files an appeal bond in the sum of fifty (50) dollars, with Reuben Allen as surety, which bond and the surety thereto are this day approved by me.

J. H. McCulloch,
County Judge.

October 6, 1885: Gave transcript and papers to plaintiff's attorney. In County Court for Doug-

las County, Nebraska, before the Hon. J. H. McCulloch, County Judge in and for said county, Seth E. Ward, Complainant. *v.* Jacob Elton, John Flanagan and Julia Flanagan, Defendants. Be it remembered, that on the trial of said action by the said judge at his office in said county, on the 5th day of August, 1885, the said plaintiff, to maintain his complaint, moved to strike the answer of John and Julia Flanagan, defendants in said case, from the files on the ground that said answer was immaterial, irrelevant and incompetent, not responsive to the complaint, and that the said answer states no sufficient ground of defense to said complaint; which motion was overruled by the said court and plaintiff excepted to said ruling at the time said ruling was made.

Defendants John and Julia Flanagan, to maintain their defense to said action, offered the testimony of himself, John Flanagan, also the testimony of Harriet Emaline Williams, Maria G. Clark and Julia Flanagan; which testimony is set forth in "Exhibit A" hereto attached and made a part of this bill of exceptions, and rulings on the introduction of said testimony being had and taken at the said trial at the time said rulings were made, as set forth and shown by the said "Exhibit A."

To all of which said rulings of the said judge, also the final decision in said case on the merits, the said plaintiff excepts and prays said judge to set his hand and seal to this bill of exceptions, which is done accordingly by — this 14th day of August, 1885.

J. H. McCulloch,
County Judge.

Service of summons in error in the above entitled action is hereby waived and said defendant appears in said action, hereby waiving any and all process for the same.

JOHN FLANAGAN AND
JULIA FLANAGAN,
By D. Van Etten, Their Attorney.

"EXHIBIT A."

JOHN FLANAGAN, being duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. VAN ETTEN.

Q. Of whom did you get that land? A. Mr. Taylor. He owed me and took me up there and showed me the line.

Objected to. Plaintiff asks that the answer be stricken out as immaterial, irrelevant and incompetent. Overruled. Plaintiff excepts.

Q. State how you got this land from Mr. Taylor? A. I worked for him.

Q. As to purshase or otherwise—did you buy it from him? A. Yes, sir.

Q. He put you on the land and gave you possession of it? A. Yes, sir; him and his wife.

Objected to as immaterial, incompetent and irrelevant. Overruled. Plaintiff excepts.

Q. How long ago was that? A. I do not know exactly, but this was a territory at that time.

Q. What time was it with reference to the fall of Fort Donelson? A. It was the next spring after the fall of Fort Donelson.

Q. When did you come here? [The same objection—immaterial, incompetent and irrelevant. Overruled. Plaintiff excepts.] A. I came from Fort Donelson here that spring.

Q. When did you buy this land? [The same objection. Overruled. Plaintiff excepts.] A. In the spring following.

Q. Who put you in possession of it? [The same objection—irrelevant, incompetent and immaterial. Overruled. Plaintiff excepts.] A. Yes: he showed me these lines—him and his wife both. I have been in possession of it ever since.

Q. State whether or not you have disposed of the land or the possession of it to any person? [Objected to as incompetent, immaterial, irrelevant, and that the question calls for the conclusion of the witness. Overruled. Plaintiff excepts.] A. I never have.

Q. State whether or not you ever at any time leased from Jacob Elton this land or any portion of it? A. I never did; I never leased any portion of it.

HARRIET EMALINE WILLIAMS, being duly sworn, examined in chief by Mr. Van Etten, testifies as follows:

Q. What Taylor is that? A. Ed. Taylor, I think it is; he is dead now—Edward N. Taylor. I do not know how you spell his name.

Q. Did he, Flanagan, buy this land? A. I do not know whether it was bought or not. Mr. Taylor owed Flanagan some money.

Objected to as incompetent, irrelevant and immaterial. Overruled. Plaintiff excepts.

Q. State what you know about the matter. A. Mr. Taylor owed him at one time when I was working for him $150 for work that he had done for him. While I was working there Mr. Flanagan got ready to go to the village with a man, and when I was working for Mr. Taylor he came after the money. He says, I told you to keep that piece of ground if I never paid you out there, and whether Taylor ever paid him or not I do not know. That was the first time. He came again. He had not paid him then, because they spoke in the dining-room. He says, "I told you that I hadn't any money, but you could keep that piece of land." I did not know where the land was. I was working for Mr. Taylor at the time. That was when I got acquainted with Mr. Flanagan. This was about eighteen years ago, when I worked for Mr. Taylor.

MARIA G. CLARKE, being duly sworn, testifies as follows:

EXAMINATION IN CHIEF BY MR. VAN ETTEN.

Q. Do you know anything about this land alleged to have been bought by John from Mr. Taylor? A. I worked for Mr. Taylor and heard him tell John that he had a piece of land; that he would take him out and let him look at it. I do not know whether he took it or not. He told him that he could have the piece of land.

Q. Do you know what he gave them—the

piece of land—for what John gave him for the piece of land, if anything? [Objected to as not identifying the land, and as being too remote and immaterial. Overruled. Plaintiff excepts.] A. For work; I know that Mr. Flanagan worked for him, cutting wood and running a mowing machine.

JULIA FLANAGAN, being duly sworn, examined in chief by Mr. Van Etten, testifies as follows:

Q. How long have you lived upon the land? A. Going on eleven years.

Objected to as incompetent, irrelevant and immaterial. Overruled. Plaintiff excepts.

Q. State whether or not you know from whom John bought the land? [The same objection as last—incompetent, irrelevant and immaterial. Overruled. Plaintiff excepts.] A. From Mr. Taylor.

Q. How long ago was this, if you know, about? A. Mr. Taylor had made a bargain with him about the land before I got married to him.

Mr. BALLOU: You know this of your own knowledge? A. Yes, sir.

Mr. VAN ETTEN: Did you hear Mr. Taylor and Mr. Flanagan talk about it? A. No; I heard Mr. Taylor talk to me about it before he died; that was the last time I saw Mr. Taylor.

Q. State whether or not you know of your own knowledge that Flanagan bought the land of Mr. Taylor. A. He says he bought it of him.

Mr. Taylor owed him money. I know that he worked there before I was married.

Objected to.

The WITNESS: I am talking about what Mr. Taylor told me. He told John to live there as long as he lived; that it was his place, and he owed John money and could not pay him; he had a very sick family. I was there and helped.

I hereby certify that the extracts of testimony above, of John Flanagan, Harriet Emaline Williams, Maria G. Clarke and Julia Flanagan, is the testimony taken by me in the case of *Ward v. Flanagan*, before His Honor J. H. McCulloch, county judge, August 5, 1885, and the same are the testimony and correct as far as appears in this transcript.

Fees, ——.

Paid by O. H. Ballou.

C. A. POTTER, Reporter.

Plaintiff objected to the introduction of the record on the ground that it was incompetent, irrelevant and immaterial. The objection was by the court overruled, and plaintiff at the time excepted.

The defendant then withdrew the part of the offer where it says that it is offered for the purpose of showing adjudication.

Plaintiff then objected to the introduction of the record for the purpose of showing adverse possession. The objection was by the court overruled and excepted to by plaintiff. Rec. pp. 60-67.

PLAINTIFF'S EVIDENCE IN REBUTTAL.

REUBEN ALLEN testified for plaintiff in substance as follows:

I lived in Omaha from the fall of '71 to 1886. Was in the commission business for most of the time, dealing in real estate. Mr. Housel and I were partners, and we acted as agents for Mr. Ward until after the dissolution of the partnership, when I continued to act for Mr. Ward. Our agency for him was paying taxes on his lands at Omaha, and collecting rents. Was agent for the land in controversy. I think our agency commenced in 1878—I know certainly we were agents in 1879. When first appointed agent I went upon the land and found a man there by the name of John Flanagan, living in a little cabin on the corner of it. There was a fence on the south side, but none on the north and east. There was a road right through the land. The fences on the south and west side were part of the fences surrounding the adjacent fields. There was a part of the land that looked like it was cultivated and part not. Mr. Housel and I went out there in a buggy and Flanagan and his wife were there. Had a conversation with Flanagan. He said he had been paying rent to Mr. McClure, the administrator of the Edward B. Taylor estate, and that he got the right to go on it from Mr. McClure.

We told him that Mr. Ward was the owner of that land now by forfeiture of a mortgage, and that he would have to pay rent on it. John Flanagan said he did not own anything, but his wife Julia owned all the personal property—some cows—and he would agree to pay $60 for a year's rent, and Julia would give a chattel mortgage for it. I would state further that they afterward came to Mr. Housel in my office, and we gave them a lease, and they gave chattel mortgage on some cows. They were both present when the lease and chattel mortgage were made.

[The witness identified the lease, and the lease was introduced in evidence.]

The lease is from Housel & Allen, agents, to Julia Flanagan, and was signed by all three. It leased the 20-acre tract in dispute for nine months, terminating on the 28th of February, 1879, for $60.00, payable on the first of October, 1878.

The lease contains the provision that at the expiration of the term, or at any earlier termination of the lease, that the lessee will quietly and peaceably yield up possession of said premises to Housel & Allen, agents, in as good condition as when entered upon. Julia Flanagan also gave a note for $60.00 for the rent, which was identified and put in evidence, and a chattel mortgage to secure $45.00 of the note.

Part of the note was paid by two loads of corn, one to Housel and one to myself. (When the payments were made, the following endorse-

ment was made on the Chattel Mortgage in Mr. Housel's handwriting: "Received of John Flanagan two loads of corn, part payment of this lease, 30 bushels at 25 cents a bushel.")

John Flanagan hauled this corn and delivered it, as he said, to pay on the lease, and was stated by him to be in part payment of the lease. John Flanagan and his wife were present when they delivered the corn. Nothing further was received from them. Asked John Flanagan several times for further payments. He would generally say he was in hard luck and could not get the money to pay it up, and that if the cattle were taken away it would rob them of everything they had. We did not foreclose the mortgage because we felt a reluctance in taking the cattle from them. When we first went to Flanagan's cabin on that land, and made known to him and his wife that Ward owned the land, Flanagan made no claim of ownership at all, and never made any, and when we dunned him for the rent he never made any. When this lease expired we rented the land to Jacob Elton. He commenced in 1879. The lease was in writing and was for the whole 20 acres. We notified Flanagans that they could not keep it any longer. We rented the land from '79 to '84 to Elton. The renting was from year to year. The first lease to Elton only was in writing, and was for a year. Elton was to pay $60 a year for part of the time; subsequently the price was raised on him to $80 a year. I have kept a book showing the payments that

were made by Elton. It is the book of original entry, showing my accounts with Seth E. Ward, the plaintiff. The entries were made at the time they purport to be, and at the time the moneys were received and disbursed. I received from Elton $60, the full consideration for the 20 acres, each year, and $40 for one-half of the year 1884. He said he had too much trouble and expense to pay any more rent on it, trying to get John Flanagan off. He said this in 1884. We paid the taxes for Ward from '78 to '85. The entry on the books shows the taxes were paid every year.

[The book of original accounts referred to by the witness was introduced in evidence, and it shows that Elton paid $60 per year rent during the years 1879, 1880, 1881, 1882 and 1883, and $40 for half a year to July first, 1884, and $26.80 on the remaining half of the year. It also shows the payments of taxes for Ward.]

I was not acquainted with the land prior to 1878, and don't know whether it was occupied.

ON CROSS-EXAMINATION.

When the lease was drawn we were acting as agents for Seth E. Ward. We were at one time the agent of Lucinda Randolph, who claimed some interest in the land by virtue of purchase for taxes. Julia Flanagan claimed to be the owner of the cows. John Flanagan made no claim to own the land. They did not pretend that Julia owned the land. We made the lease to Julia because she owned the stock, and she gave the security on it for that reason. We took that chattel

mortgage as security for the rent. We loaned them no money—did not advance them anything. We took the chattel mortgage for $45.00, because that was the amount the cattle were worth, Mrs. Flanagan said. We took them as part security, and they were to pay the balance. This corn was paid on the lease. I never took any steps to collect the note. We had a reluctance about taking away all the stock they had. We asked them to pay the note but took no legal proceedings. Never heard of any troubles between Elton and Flanagan until 1884, when he quit paying rents, and said he had trouble with Flanagan. The lease is marked cancelled—I don't know how that happened.

RE-DIRECT EXAMINATION.

I was informed by Elton that he had sub-leased a portion of this land to Flanagan, that he had sub-leased a portion of it every year. I was informed by Elton that he had simply sub-leased one acre, and farmed all the balance with the exception of one acre where the house stood. I think Elton permitted Flanagans to stay there because he hated to chase them off. I know Elton told me this: That Mrs. Flanagan was a good kind of woman—that he had no objections about her staying—but John was kind of troublesome, though. I never heard of Flanagan or his wife making any claim of ownership or title to this property whatever until they employed David Van Etten as their attorney. They did not, in all the conversation I ever heard, and in all the

times I ever dunned them, they never had made any claims of ownership at all. Rec. pp. 97 to 117.

CHARLES C. HOUSEL testified:

Formerly lived in Omaha. Allen and I were agents of Lucinda Randolph, who held a tax title against this property. In July, 1877, we compromised that with Mr. Ward, and became his agents immediately after this settlement. Our agency went from one to the other. The first time we ever went onto the land for Mr. Ward was in the spring of 1877. I think there was a fence on the west and south of it—somebody else's fence, probably. The house was a shack of a cabin. Spoke to Flanagan and told him that Mr. Ward owned the land under foreclosure of mortgage—that we were agents and wanted the possession, and wanted a lease or something to recognize Mr. Ward's possession. Flanagan and his wife never made any claim of ownership to the land. He replied that he would have to rent it or lease it. Wanted to make a lease for it. We told him if he would give us security on the lease for payment—I have got an account against him since 1871 on the books, and knew he was bad pay—I told him if he would give security we would make a lease. So they finally offered to take the lease and give security on the stock. We found she owned the stock, and of course we did not want to take the lease from John. She owned all the property, and we wanted the lease from her. She was willing to do that.

[This witness also identifies the lease. and the note and the chattel mortgage of Julia Flanagan.]

Flanagan brought in corn to pay on the lease. He had promised fifty times to pay. During all that time he never made any claim to the property. I don't think we had any but the one lease with him. My partnership with Mr. Allen expired in '78, and Mr. Allen took charge of this land. I suppose we dunned John and his wife for the rental two hundred times. I don't know how many times. Every time I saw him he promised he would sell his flax and his corn and hogs. He said "I am ashamed to see you—I hate to think of it." He promised it from time to time in that way. I saw Flanagan about yielding possession to us as agents for Lucinda Randolph under that tax title, and he did not put in any plea as to ownership or anything else. The first time I ever heard that he claimed Taylor had deeded it to him or gave it to him for services, was in the first trial that Elton had with him. That may be later than 1880. We paid taxes right along for Mr. Ward. Mr. Taylor lived next door to me, and that is the way I got acquainted with Flanagan. He was there for a good many years. He did not work around the house of Taylor, but he was there a good deal. Taylor told me about his being on the place working, but I don't remember what time that was, but it was after I moved there some time. Rec. pp. 117 to 121.

JACOB ELTON testified:

Have known Flanagan since 1870. I first came to Omaha in 1870. I first rented the land adjoining the tract in dispute. Subsequently bought it, and sold part of it last fall, and am now living on part of it. John Flanagan was then living over near the barracks. In 1870 this land was a prairie. There was a fence on the south and on the north, and this fence belonged to the other property. There was no one living on the property at that time, nor working it. There were no crops on it, only weeds and grass what the cattle left the summer before. My brother and I bought a couple of cows and commenced to put them out on this place to grass as soon as I rented the place I was living on. That was in 1870. Nobody objected. There was no one to object. There was no house on it. There was nothing but a hole or something like that—some sumacs or something like that—as though there had been a dugout, with weeds and sumacs grown up. John Flanagan was then living near the southwest corner of five acres of ground between the Steve Ide place and the barracks ground. He lived on the west part of that five acres. He had two little houses he claimed to own. He lived there until he rented the Steve Ide place, and then moved onto that. I think that was in '74. From '70 to '74 he had not lived on this twenty acres and never farmed it. I think Flanagan stayed on the Steve Ide place a year. From there he moved

onto the south end of this twenty acres. I think that was in '75 or '76. He moved a little house on, or some one helped him to, and lived in it. He commenced plowing some of the ground on the south side of the ditch. There is a ditch which runs through diagonally from west to east, and he commenced to plow on the south side of the ditch. Cattle were herded on there from '75 to '78. He did not cultivate both sides of the ditch. I took a lease of this twenty-acre tract from the plaintiff, Mr. Ward, in the spring of '79. It was in writing.

[The witness produces the lease, and it is introduced in evidence. The lease is signed by Seth E. Ward, by Reuben Allen, agent, and by Jacob Elton, and is for one year from the first of April, 1879, the rent to be paid at sixty dollars a year, payable quarterly.]

Acting upon that lease I took possession, and told Mr. Flanagan I had rented it of Mr. Allen, the agent for Mr. Ward, for the term of one year, and Mr. Flanagan said he hoped I would not turn him off. I told him I would not send him as he tried to send me, that I was friendly to him. In 1878 I rented from Mrs. Flanagan a roadway across the place, and paid her two dollars a year for it. In 1879 I went to Flanagan and told him I had leased it, and he said he hoped I would not turn him off, and I said I would not turn him off, that I would rent him that side of the ditch for same as I was paying for it, three dollars per acre. I told him that I did not think there were

quite six acres, and he might have it for seventeen dollars a year. He had cultivated both sides of the ditch in 1878. The other side of the ditch I rented to him in '79; he was to pay seventeen dollars a year. I rented it to him for three years, one year at a time. He paid for it in work and other things. I have a book account that I kept my accounts in.

[Witness here identifies it. The book is in evidence and shows that in '80, '81 and '82 Flanagan paid small amounts, amounting to about eighteen dollars, and was charged with seventeen dollars a year for rent.]

During the three years I had no trouble with Flanagan. He never claimed any ownership only that Mr. Taylor told him he could have the use of it as long as he lived. That was not until after the end of the third year, I believe. At the end of the three years I gave him notice to leave, and under that notice rented one acre where the house stands to Mrs. Flanagan. After I rented the one acre I took possession of the balance of the property, and plowed it all but one acre. There was no objection on the part of Flanagan until after I had plowed it. In '84 I sued Flanagan for possession of the property before Judge Anderson. I sued him before Judge Anderson and the day of the trial Judge Anderson reserved his decision from Friday until Monday—I would not be positive about the dates. It was Monday that he rendered his decision, at 10 o'clock. Mr. Flanagan was there when I got to

Judge Anderson's office. Judge Anderson said, "I have given a decision unfavorable to Uncle John, but he has no money to move out and don't want to be put off." I said I did not care about putting him off, but I wanted the rent. I said: He can stay on, providing he will pay five dollars a year rent and the costs of this suit, or give security. Mr. Flanagan agreed right there to give security. I remember Flanagan testified in that case. He was asked the question if he was not Mr. Taylor's tenant, and he said he was. Old Mr. Taylor was then dead. I suppose he meant young Ed Taylor. He didn't say.

ON CROSS-EXAMINATION.

I am positive that Flanagan did not live on this twenty-acre tract until he left the Steve Ide place in 1875. Rec. pp. 121–127.

REUBEN ELTON testified:

Have lived in Omaha since March 20th, 1870, and am now twenty-five years old. Know the land in dispute. In 1870 it was prairie land unbroken. There was no house on it; don't remember that there was any dugout. Flanagan was then living near the southwest corner of Ft. Omaha, by the barracks. Lived there about two years and moved to the Steve Ide farm. He went from that farm to the twenty acres in dispute about 1875. From '70 to '75 there was no corn or other grain planted there, nor hay cut. Cattle were herded there,—my father's and our neighbor's. My father, Jacob

Elton, took possession of the land in '79—plowed, cultivated and planted it. Flanagan rented of my father about three years seven acres in the south part. It was south of the ditch.

ON CROSS-EXAMINATION.

The first time I remember of a house on the land was in '75. There was a dugout put up in '75. I don't remember that there had been a dugout there previously. Rec. pp. 140–144.

CHARLES ELTON testified:

I am 24 years old the 25th of December. I am the son of Jacob Elton. I came to Omaha in '70. Made John Flanagan's acquaintance the first year I was here. Know the land in dispute. In 1870 it was a prairie. The first year I went to school. I herded cattle on this land the second or third year, I guess. I herded father's cows and our neighbor's cows on this disputed twenty acres and ground adjoining it. There was no house there and no fence, except on the north and south side. No one planted or plowed there. During the time we herded there nobody ever prohibited us going on. Flanagan never told us to get off. When I first made the acquaintance of Flanagan he was living at the southwest corner of Fort Omaha. From there he moved to the Steve Ide place and stayed there, I think, only a year, and moved from there to this twenty acres in dispute. I think it was in the year '75 or '76, I am not sure which.

ON CROSS-EXAMINATION.

I was about seven years old when I first came to Omaha. Flanagan did not claim this land until after he had rented it a year or two from my father. I don't remember that he ever claimed anything about it until about the year father would not rent it to him any more. Rec.pp.145-149.

JOHN SIMPSON testified:

I came to Omaha in '70. I rented a little place from Flanagan out at the southwest corner of the barracks where Flanagan lived. He lived in one house and rented me one. These houses were five or ten rods just across south of the road from the barracks. They were close together. I know the twenty acres in dispute. It was not on this land that Flanagan gathered his crops at this time. I lived right adjoining the land in dispute years afterwards. In '70 and '71 it was lying out in the commons, for everyone to graze and drive their stock on. There was no building on it. Don't think there was any dugout. I think where they termed this dugout was were some ditches dug around in the neighborhood. I think it was staked off for claims in early days. I did not find any evidence of habitation; did not look for any. There was no building in plain sight. The twenty acres was enclosed all around except the east side, and that was open. It was enclosed by other men's enclosure though. The Steve Ide place was on the north. I knew John Flanagan ever since

he came to the country. I worked for him the first work I ever did, except for Tom Murray in 1870. Flanagan lived at the fort for two or three years after I came here—as much as two, if not three—and moved from there to the Steve Ide place, and lived there, I think, a year or two. I don't think Flanagan farmed anywhere else while he lived on the Steve Ide place. I think he went from the Steve Ide place onto this twenty-acre tract. The next I knew of him he had a little dugout or little barn or something put up south of the track. From 1870 there was no cultivation of these twenty acres down to 1875. My cattle pastured on that twenty acres as much as anywhere—that was my regular pasture. There was no objection made by Flanagan or anybody. I worked for Elton in '70, '71, '72 and '73.

ON CROSS-EXAMINATION.

My best recollection is that Flanagan went onto this land in '75. After Flanagan went on it I think that he stayed there pretty much all the time since he was on it. Rec. pp. 161–165.

J. C. DENISE testified:

I have lived in Omaha about twenty years. I am and have been agent for what is called the Steve Ide place. The title was in Mrs. Collyer. I have been the agent since '72 or '73. Have known Flanagan since about that time. In 1873 he was living on the Ide farm under a lease that he made with me. He occupied that farm one year, that of

1873. Shortly after that he was living on the twenty acres in dispute.

ON CROSS-EXAMINATION.

My impression is that Flanagan went from the Steve Ide place in the spring of '74. Rec. pp. 165–166.

HENRY MACK testified:

I came to Omaha in the fall of 1873, and have known Flanagan ever since I came here. He built a house upon the twenty acres in dispute in the spring of 1874. I helped him. There was nothing on it when we went there. There was a fence on the south and west sides of the forty acres, and a fence on the north side. These fences were not particularly to enclose that piece of ground, only to run between the two places—to run on the line between the two pieces of property. I don't know which it belonged to. On the east side there was no fence. There was no house of any kind on there then. We dug a cellar and built the house. Flanagan said he was going to jump it. I don't recollect that he said anything about that he knew who owned it—he said he was going to jump it. It did not appear to have been farmed for years. There was nothing only some weeds and sunflowers. Mr. Elton was herding on it at that time. I worked there and the summer afterwards. The house was a little cottage house.

ON CROSS-EXAMINATION.

About the first of March or latter part of Feb-

ruary, 1874, Flanagan and I built a frame house on that property, and so far as I know Flanagan lived there until about a couple of years ago. All of the twenty acres west of the road was grown up to sun-flowers at the time. I could not see anything like a dugout that I knew of. Did not go around among the sun-flowers to look for one. Rec. pp. 167–168.

L. E. Simpson testified:

Have been in Douglass County since 1870. First lived for about ten days down in one of Tom Murray's houses, then in one of John Flanagan's down southwest of the barracks. My father rented of him. John Flanagan was living at this time at a house a little east of my father's. He lived there two or three years after we lived at the barracks, then he went to the Steve Ide farm. Never saw anybody cultivate it for the years '70, '71, '72 and '73. There were herds of cows and cattle on it. Mr. Elton and Mr. Thompson were herding there. Thompson was a milk-man. I went on this land in '79 for Mr. Elton and cultivated it. We raised about five acres of potatoes and the rest in corn. Flanagan was living there at the corner place. Elton and Flanagan were quarreling about it all the time, but I never heard Flanagan say whether he owned it or not. I worked up until about the twentieth of July, 1880, then I quit Mr. Elton. Rec. pp. 168–173.

E. A. McCLURE testified:

Edward B. Taylor, deceased, was a brother-in-law of mine. Subsequent to his death I was appointed administrator of his estate. Have known John Flanagan for a number of years—as early as 1864. Was in partnership with Mr. Taylor in the publishing business of the Omaha *Republican*, the same one that is still in existence. I don't know whether Flanagan ever worked there while I was away. He told me he worked there—that is all I know about it. I never saw him work there. Edward B. Taylor died May 22, 1872. I talked with John Flanagan, after my appointment as administrator, about the land in dispute. He came and paid a month's rent on it. He said that he would pay the rent as long as he was able to. He said this: That he was on the land and very poor, and he put in a crop of corn or something and some of his neighbors were bothering him and destroying it, and I told him that if he could not raise anything off of it I would not expect him to pay anything. This must have been in '73. At this time there was a little shanty of some kind—a kind of board dug-out, I think.

ON CROSS-EXAMINATION.

My impression is that Flanagan was there when Taylor died. How long he had been living there I don't know. Flanagan came and related his troubles to me—said that some of his neighbors were pulling up his wheat or corn. The particulars I don't recollect. Rec. pp. 178–180.

Mrs. ELLA ARNOLD testified:

I am forty years of age and live at Janesville, Rock County, Ohio. Edward B. Taylor, deceased, formerly of Omaha, Nebraska, was my father. I resided in Omaha from the fall of '61 to the fall of '73. I know the old darkey John Flanagan very well. I don't know that father ever gave John Flanagan, absolutely, the forty-acre tract of land near the barracks mentioned, or any part thereof, but that he, father, gave him, Flanagan, permission to use the land in question for agricultural purposes; that is, allowed him to farm the land in question until such time as my father or the family, in case of father's death, saw proper to sell or occupy same. John Flanagan resided on father's forty acres near the barracks, or a part of said tract, up to the time I left Omaha in 1873. I did not at any time ever hear of father selling or giving or agreeing to convey said lands, or any part thereof, to Flanagan. Rec. pp. 153–157.

EDWARD A. TAYLOR testified:

I am son of Edward B. Taylor, deceased. Have known John Flanagan ever since I was a little boy. Knew the twenty acres in dispute. Have rode over it with my father. I sold my interest and gave a quit-claim deed to Ward. I remember of riding over the land in '65 or '66. The way I remember it, father bought me a pony. I remember of following the family carriage out there one time on

my pony. My father and mother and one of my sisters were along. Father showed us the land, I remember, and spoke of building there at some future time. Flanagan called at my house in Omaha to talk about this twenty acres of land about the time that I brought suit to recover it from Ward and Housel. It was before the suit was brought. Flanagan told me that he had been to see Mr. Estabrook, my lawyer, and found that I had an interest there. He wanted to know whether I cared if he stayed on the land or not, and I told him no, I did not. He said that my father told him he could stay there as long as he wanted to, so long as he (my father) didn't want it. I had several interviews with him after that. Flanagan never made any claim of ownership, or of my father having given, sold or conveyed that property to him any further than he stated that father told him he could stay there until such time as he (father) wanted it, or until some of us put him off. About a year after that I had an interview with Flanagan in the office in the presence of David VanEtten in reference to this property. He wanted me to quit claim my interest to him, and said if we did this that after his death it would revert to me and my sister.

ON CROSS-EXAMINATION.

Flanagan went on the land during father's lifetime, and lived there—I could not say how long. I understood Flanagan to say that he was to stay there as long as my father did not want it, or some of the children put him off. I might have at first stated that he said he was to stay there until my

father wanted it. He stated that he could stay there as long as father did not want it or some of his heirs put him off. He wanted to find out if any of us did want it, and that is the reason he went to Mr. Estabrook. Rec. pp. 174–178.

The plaintiff also introduced a warranty deed from Edward B. Taylor to James E. Boyd for the east twenty acres of the forty-acre tract claimed by Flanagan, of which the twenty acres in dispute is the other part. This deed is dated May 14, 1870, and recites the consideration of $6,000 in hand paid by Boyd. This is the land subsequently platted as Boyd's Addition to the city of Omaha.

The plaintiff offered in evidence tax receipts of the treasurer's office of Douglass County, showing payment of taxes by plaintiff on the land in question, for each of the years from 1862 to 1870 inclusive, and also the tax receipts of the county treasurer of Douglass County from 1870 to 1887 inclusive.

DEFENDANT'S EVIDENCE IN REBUTTAL.

JOHN FLANAGAN testified:

Q. Do you remember Housel & Allen coming up to your place? [Objected to on the ground that witness has answered on cross-examination that Housel & Allen never came to his place.] A. Mr. Allen came there and brought a

man there and said it was Mr. Ward. He said that he was going to pull my shanty down and I told him to pull it down. That was all.

Q. State if you owed Housel & Allen any money at any time? A. Yes, sir; I did.

Q. Did they dun you for it? A. Yes, sir.

Q. Did you haul any corn to either Housel or Allen? A. Yes, sir.

Q. How much did you haul? A. I don't recollect exactly how much, but I know that I owed them for two scales, a pair of blades, a cultivator. That was what the corn was for.

Q. How much corn did you haul? A. One load to Mr. Allen and one to Mr. Housel. I think twelve bushels in one load.

Q. Was that corn for the rent, or what was it for? A. It was for the scales and cultivator.

Q. Did Housel & Allen or either of them ever talk to you about renting this place? A. No, sir.

Q. Was you down there at their office when they got your wife to sign some papers? A. I was down and got a cultivator.

Q. What was it that they got your wife to sign? A. They had my wife to sign some $25.00—I think it was in a cultivator—second-hand cultivator—and $7.00 for two scales and a Champion reaper. He was the only man that had them in town.

Q. What was it that they said that was for your wife to sign? A. That was what they had her sign for—security.

Q. They wanted her to sign for security, for

what you had got—for what you owed? A. Yes, sir.

Q. Was there anything said at that conversation about lease money on the land? A. Not a word said.

Q. Did they read the paper that they got your wife to sign? A. They never read any paper at all.

Q. Did they ever afterwards demand any rent of you? A. They never did, sir.

Q. After your wife signed these papers—whatever they were—did they ever, either of them, talk to you at any time up to this time about the rent? A. Not a word about it; only asked when I was going to bring the balance of the corn for the cultivator.

Q. When your wife signed this paper down there did they give your wife a copy? A. No; not a scratch of the pen.

Q. Whatever was signed they kept? A. Yes; they kept everything that was signed.

Q. What was there about Mrs. Flanagan when you were present making any agreement to rent this land from Jacob Elton? A. Me and Elton was quarreling about the land and I was trying to get him off and he was trying to get me off, and my wife went to his wife—she was sick and confined—two or three times, and they kept the money, and she tofd him if they would stop—

Q. Were you present when she told them anything? A. Yes, sir, I was, and Mrs. Elton and her got together and she said she hated to hear so

much fuss and quarreling, and so they kept this money from my wife and got some chickens; and I said, Don't you let him have a cent, and I forbid her letting him have a cent. I told her if she didn't stop I would slap her and she said she would leave, and I said, Leave if you choose to, but not to pay Elton nothing. Mr. Elton came up and plowed my wheat and potatoes and done me in every way, and he or somebody killed my hogs.

Q. During any of this time did you make any agreement with Mr. Elton about rent or renting of him? A. I never did.

Q. Did you ever pay him any rent? A. I never paid him a cent and never would.

Q. What was there about your giving Mr. McClure $5.00? A. I never gave McClure $5.00. He gave my wife $4.00 for a load of corn when we were quarreling there—me and Elton. I went to see Mr. McClure for protection. I had a pile of corn and Mr. McClure asked me if I had corn to sell and I said, Yes, and he paid my wife $4.00, and I took that money and bought some *money and bought some* flour and took it home.

Q. You went to Mr. McClure for protection against Mr. Elton? [Objected to. Sustained.] A. Yes, sir.

Q. Were you present when the case was tried before Justice STEINBURG and a jury? A. Yes, sir.

Q. Between Mr. Elton and you? A. Yes, sir.

Q. I mean that case where the jury brought in a verdict your way? A. Yes, sir.

Q. Did you hear Jacob Elton testify on that trial? A. Yes, sir.

Q. Did he on that trial testify that you or your wife had never paid him any rent? A. He did, sir; and he swore to it.

Q. Do you remember that time in Anderson's court? A. Yes, sir.

Q. Before that got to trial in that case they dismissed it against you, didn't they? A. Yes; I believe they did; Mr. Estabrook knows.

Q. He was acting as your lawyer? A. Yes, sir.

Q. After it was over you heard Elton swear to your agreeing to give him $5.00? A. Yes, sir.

Q. Did you have any talk about that? A. I never had any talk about it.

Q. What talk did you have after that was over? A. They talked about putting me in jail, and I told them to put me in jail, and so Mr. Anderson said, No; I won't put an old man like you in jail, and I said, No; put me in jail; and I went to Mr. Estabrook, and Mr. Estabrook told me to go home and stay to home.

CROSS-EXAMINATION.

Q. You gave a load of corn to Mr. Allen in payment of scales and reapers that you bought? A. No, sir; I didn't.

Q. What did you give the load of corn for? A. For two scales.

Q. That you bought of Housel & Allen? A. Yes, sir; and a cultivator.

Q. Don't you know that Housel & Allen were

not partners in any commission business; that it was C. C. Housel alone? A. I don't know anything about that; I don't know who was partners, nor nothing. I know that Mr. Housel let me have the scales and told me to pay Mr. Allen some corn.

Q. He told you to pay Mr. Allen for the scales? A. Yes, sir.

Q. So, when Mr. Housel got you to sign a lease for this property, you didn't know what you were signing? A. I never signed it.

Q. Did you ever sign an instrument where Benjamin Ittner was present at the time when it was signed? Did you know Ben. Ittner in his lifetime? A. No; I knew him, but I was not anywhere with him and Housel.

Q. Did you ever sign the instrument when he was present? A. I never did.

Q. Do you know whether your wife did or not? A. No; my wife didn't neither.

Q. You were present with your wife when you and she signed some papers, weren't you? A. Yes, sir.

Q. If Mr. Housel states that you paid him some corn to apply on the rent, he is mistaken, is he not?

Objected to. Rec. 180–183.

JULIA FLANAGAN testified:

Q. Did Housel and Allen ever come to see you at your house? A. Yes, sir; Mr. Allen was

up there with a gentleman he gave me an introduction to, and said it was Mr. Ward.

Q. Was it the Mr. Ward here? A. No; that's not the gentleman.

Q. What talk was had there? A. He asked me if this was Mr. Ward's land, and I said No, this was Mr. Flanagan's land, and he said to Mr. Ward, as he called him, Let us go and examine the line; and they went over to Mr. Elton's, and I never saw them again.

Q. Was you down at Housel and Allen's office when some papers were signed? A. Yes; I was down there.

Q. What was said there? A. We were there one morning a good while, and Mr. Allen came in and said that Mr. Housel was not there and he wanted us to sign some papers for that cultivator and scales; that John had been owing him two or three years, he said. I could not read nor write, and I didn't know what it was. He got me to touch a pen and I touched a pen.

Q. Did they read any of these papers to you? A. No, sir.

Q. After you touched the pen did they give you any copies of them? A. No, sir.

CROSS-EXAMINATION.

Q. You remember of touching the pen to that document or something like that? A. No, sir.

Q. Did they tell you it was the security for the scales or something? A. I don't recollect that.

Q. You don't recollect of having put your

pen to the paper like that in the world? A. No, sir.

Q. Did you ever? A. Not that I know of.

Q. Do you swear that you never touched a pen to the paper like that? A. It was not like that. It was a smaller paper.

Q. Did you ever touch a paper about as big as that (paper being folded up)? A. No; it was a little bigger than that.

Q. Did you ever touch one to a paper as small as that? A. No, sir.

Q. So you never made your mark on that paper? A. No, sir.

Q. You will swear to the jury that you never did? A. Yes, sir.

Q. Did you ever touch your pen to a paper as big as that? A. No, sir.

Q. It was between that and the little one (referring to paper opened out)? A. Yes, sir.

Q. Will you swear that you never made your mark to that? A. Yes; I will swear that it is not that big.

Q. Did you not sign that paper? A. No, sir.

RE-DIRECT EXAMINATION BY MR. THURSTON.

Q. You touched whatever they told you? A. Yes sir.

Q. Was it about that big? A. It was half as big as that.

Q. As if it was folded that way? A. No; it was half as big as the half of that sheet.

Q. That way (indicating)? A. Yes sir.

Q. Did you take it in your hand at all? A. No, sir.

Q. Just as it looked upon the desk? A. Yes, sir. Rec. pp. 185–186.

David VanEtten testified on the trial of complaint for forcible entry and detainer against John and Julia Flanagan, before Justice Steinberg—that Jacob Elton then testified that Flanagan had never paid him any rent, and never would pay him any. Rec. p. 183.

Jno. Payner testified that at same trial Elton testified that he had called on Flanagan for rent, and Flanagan had promised to pay him rent but never did. Rec. p. 184.

Charles A. Potter testified for defendant that he was shorthand reporter, and reported the proceedings in the County Court in the case of Ward against Flanagan before Judge McCulloch, and that Elton swore in that case that he got a couple of pigs and a couple of chickens from Flanagan. Rec. p. 187.

We have made the abstract of the evidence bearing on the question of adverse possesssion fuller than was perhaps necessary. We have endeavored to embrace in the abstract all the material evidence bearing on the question, as we regard it important that this court shall have a full view of the case.

An analysis of this evidence shows that Edward B. Taylor was the owner in fee simple of the forty acres of land described as the N. E. ¼ of

the S. W. ¼ of Sec. 4, Township 15, Range 13. He acquired this forty-acre tract on the 5th day of July, 1862, and paid therefor the sum of four hundred and fifty dollars ($450). He was a prominent citizen of Omaha, the editor and publisher of the Omaha *Republican*. He was a man of family, consisting of wife and children. He lived at Omaha until the 22d day of May, 1872, the time of his death. He sold the east half of the forty-acre tract on the 14th day of May, 1870, to James E. Boyd (Ex-Governor Boyd) for $6,000, and thereupon Boyd took possession and platted it as Boyd's Addition, and no one ever claimed it in hostility to Boyd. On the 28th day of July, 1871, Taylor mortgaged the remaining twenty, being the tract sued for in this case, to Seth E. Ward, plaintiff, to secure the payment of certain promissory notes for borrowed money, in the sum of $6,000. At the time that plaintiff took the mortgage, the land was not fenced and was a common herding and grazing ground for the cattle owned by people living in the neighborhood. Nobody was living upon the twenty acres, and if anyone ever had lived there they had only lived in what was known as a sod house or dugout, which had long since been washed away by the recurring rains and storms.

The notes of plaintiff secured by the Taylor mortgage were: one for $3,000, due in twelve months, and the other for $3,000, due in eighteen months. When the plaintiff took his mortgage he had no notice that anyone claimed any interest

in the twenty-acre tract; the title of record was perfect in Taylor, the mortgageor, and of course the title which the plaintiff subsequently acquired by the foreclosure of his mortgage related back to the date of the mortgage. Taylor not having paid the notes, Ward filed his suit to foreclose in the District Court of Douglass County, Neb., on the 26th day of June, 1874, against the administrator and heirs of Edward B. Taylor. Decree was obtained on the 17th of February, 1875, in which there was found to be due Ward $7,412.20, and the property ordered sold. The sale under the decree took place on the 26th day of June, 1876, and the deed of the sheriff and special commissioner was executed and delivered to Ward on July 16, 1877. Under the Nebraska law a mortgage is simply a lien upon real estate, and Ward had no right to the possession thereof until he acquired the deed. Immediately after acquiring the deed, Ward put the twenty-acre tract in charge of Housel & Allen, as his local agents at Omaha, Nebraska.

One Lucinda Randolph made some claim to the property by virtue of an alleged tax sale, and Ward settled with her, taking a quit-claim deed from her dated July 11, 1877, acquiring whatever interest she had. The defendant makes no claim whatever under Lucinda Randolph.

At the time Ward acquired his deed from the sheriff, and put the land into the hands of his local agents, the land was not fenced. There was a fence on the west and south sides, which be-

longed to the adjoining land. Housel and Allen went out to the land and found John Flanagan and his wife living there in a little cabin, and told them that Ward had become the owner of the land. The Flanagans expressed a desire to rent the land, but Housel and Allen would not rent it unless security was given, and John Flanagan told them that his wife owned some cattle. Housel and Allen, knowing that Flanagan himself was not to be relied upon, having had transactions with him about other matters, and that he never paid anything, agreed to rent the land to his wife for $60 a year, and thereupon executed the written lease in evidence, and took the note of Mrs. Flanagan, secured by chattel mortgage. This was all done in the presence of John Flanagan. Subsequently Flanagan hauled and delivered two loads of corn to Housel and Allen, in payment of note, the value of which, amounting to $7.50, was credited on the rent. Housel and Allen, as agents for Ward, leased the land from April first, 1879, to April first, 1880, for $60 to Jacob Elton. This lease was in writing and is in evidence. Elton went into possession under this lease in 1879, and continued under the terms of the lease from year to year until 1884, paying Ward's agent annual rent of $60 a year except the last year, when the rent was increased to $80. Flanagan begged Elton to be permitted to stay upon the land, and Elton rented him a part of the tract. At the time Elton went upon the land, it was divided by a ditch cut across it diagonally

from west to east, and the part of the land which Elton sub-let to Flanagan was south of this ditch, and consisted of six acres, at $3.00 an acre, the same rate which Elton was paying Ward for the land, and this arrangement between Elton and Flanagan was renewed from year to year for three years. Flanagan paid small sums in labor and farm products on account of the rent during these three years. At the end of the third year Elton gave Flanagan notice to leave, which resulted in renting to Mrs. Flanagan the cabin with one acre of ground on which the house stood. Subsequently Elton took possession of the remaining five acres south of the ditch and plowed and cultivated it. The lease of Elton to Julia Flanagan of the one acre was from April first, 1883, to April first, 1884, and at the expiration thereof, the Flanagans holding over, Elton brought a forcible entry and detainer suit against Julia Flanagan to recover the one acre of ground, which resulted in judgment in favor of Elton.

Upon the termination of this suit the Justice of the Peace who tried it intervened in behalf of John Flanagan and appealed to Elton not to put him off, and Elton said that he would let him stay, provided he would pay $5.00 a year rent and costs of the suit, and give security. Flanagan agreed then and there to that proposition, but never carried it out. Subsequently he began to assert claim to the 20 acres, and on March 20th, 1885, Elton sued John and Julia Flanagan for

the land, claiming that the lease had terminated by reason of the non-payment of rent. There was a trial before the Justice of the Peace and jury, resulting in a verdict for defendant.

Elton held the land as Ward's tenant until the spring of 1885, paying rent therefor, but quit the same the spring of 1885 on account of the trouble that Flanagan was giving him. On April 20th, 1885, a criminal suit was instituted against John Flanagan with Elton as prosecuting witness, charging him with trespass on the land, and this suit resulted in the acquittal of Flanagan. Ward sued Elton, John & Julia Flanagan for forcible entry and detainer before the County Court on July 2, 1885, charging that these parties had unlawfully detained the premises from him since the first of April, 1885, and that Elton had entered on the land as tenant of Ward, and that John and Julia Flanagan had entered as tenants of Elton. Elton appeared in that suit and wholly disclaimed any interest, and the case was tried, resulting in a judgment dismissing the complaint as to John and Julia Flanagan.

On November 25, 1885, John Flanagan and wife sold and conveyed by warranty deed the twenty-acre tract in controversy to Elmer G. Cochran.

Since that time down to the time of the trial of the case at bar, the defendant, Elmer G. Cochran, and Warren Cochran occupied and cultivated the land in question. Warren Cochran, the father, was a witness in the case, and testified to

the occupation and cultivation by himself and son, after the deed from Flanagan. On cross-examination Cochran testified that he was a real estate and tax title speculator, and had been educated for a clergyman, which profession he had pursued until he lost his health in the army.

The plaintiff's counsel attempted to prove on the cross examination of this witness that he had conducted the negotiations with Flanagan, and paid the consideration for the land in question, and generally that he was the agent of his son, the defendant, but was not permitted to do so owing to the ruling of the court which is complained of as error. On cross-examination, the plaintiff offered further to prove by this witness that he had addressed to the plaintiff, Mr. Ward, an anonymous letter, dated February 25, 1886, signed Joseph Collins, in which he said he was told that Ward owned the land in question; that he wanted to buy, and thought the land would answer his purpose, and inquired if Ward would sell it, and if so at what price, and asked that he reply at once, as it was nearly time to commence gardening; that he did not want to pay rent, but wanted to buy and pay cash, and asked for the lowest figures, and called for an answer directed to Joseph Collins, Omaha, Nebraska, in care of H. E. Cochran, 1509 Farnham street.

The foregoing analysis shows substantially the undisputed facts in this case fairly gathered from the great mass of testimony, leaving, however, to be considered the extraordinary and re-

markable story of John Flanagan as to his claim of title to this land,

It is impossible to deal with his story in any other way than asking the court to read the testimony in *haec verba* from beginning to end. It is a mass of contradictions and incongruities. We shall only refer at this place to its salient features.

As Flanagan tells the story, he was born in slavery in Virginia about the beginning of this century, and after having been tossed about indiscriminately from one "nigger trader" to another he turned up at Fort Donelson in 1863, and from there went to Omaha, Nebraska. Sometime after he reached Omaha, he worked for Mr. Edward B. Taylor, who was then the editor and publisher of the Omaha *Republican*. On his examination in chief he said that Taylor became indebted to him for turning the printing press, to the amount of $175. On his cross-examination he said Taylor was indebted to him for chopping wood and doing work around his residence, and turning the printing press. He dunned Taylor a great many times for the money and Taylor, being unable to pay him, gave him the forty acres of land, including the twenty acres in controversy, and the twenty acres which was subsequently platted as Boyd's Addition. He entered upon the land. There were fences of adjoining lands upon one or more sides of the forty-acre tract. Otherwise it was not fenced, and Flanagan took no steps towards fencing it. He built a dugout. It

is impossible from the testimony to say when he entered upon the land. At one place he said it was during Mr. Lincoln's last term, and during Lincoln's lifetime. At another place he said it was at the time Saunders was Governor, which was in 1867. The jury in their verdict found that he entered in 1868. A year or two afterwards he married, but does not pretend to fix the date. His wife went with him to this dugout. Afterwards it was washed away by the rains. He then removed with his wife, and lived several years up near the barracks, Ft. Omaha, which were not far off from this land, and he and his wife also lived two years on the Denise farm. It is in vain to find out from his testimony, or from his wife's testimony, what these dates were. The other testimony in the case, however, which we have heretofore set out, indisputably shows that he went from the Denise farm over to the twenty-acre tract about 1875. Henry Mack testified that he helped Flanagan build the house on the land in question in 1874.

Considering the testimony in the utmost fairness to the defendant, it may be conceded that Flanagan's first stay upon the land was during Edward B. Taylor's lifetime, and that he returned to the land after he left the Denise farm. He asserts that when he was away from the land he cut hay upon it from year to year and claimed it. It is entirely clear from his own statements that he was away from the land for several years, living with his wife elsewhere, and that he had two

houses upon it, one which was dug out when he first went upon, and afterwards washed away, and the other one that he built when he left the Denise farm. He admits that Elton farmed the land for several years. He makes no concession as to what these dates were. The dates, however, are indisputably established by the other testimony in the case, as being from 1879 to 1885. As he puts it, he and Elton were quarreling all the time, he trying to put Elton off and Elton trying to put him off, but he does concede that Elton raised crops upon the land during several years. He makes the wild claim that he paid $680 taxes on the land, though the tax receipts are in evidence from 1862, showing that they were paid by Taylor or Ward. The land was always assessed to Taylor or Ward. McClure, the administrator, positively testified that after Taylor's death Flanagan came to him and asked permission to stay upon the land, and paid him $5.00 on account of rent. This, of course, Flanagan denies. He also denies that his wife, with his consent, leased the land for a year, from 1878 to 1879, from Housel and Allen, agents of Ward, saying that the papers which his wife executed were for a cultivator, scales and reaper which he purchased from Housel and Allen. It will be noted that Housel and Allen's testimony was taken by deposition and they were not present to testify in person, but the gross improbability of Flanagan's story is apparent.

Taking this testimony all in all, and viewing it most favorably for defendant, it can only be

fairly claimed therefrom that he stated that he went upon the land sometime during Taylor's lifetime and afterwards claimed it, only cutting hay on it during the time he was not living on it.

In viewing his testimony, it must be remembered that, under the laws of the State of Nebraska, he was disqualified as a witness to speak as to any transactions between himself and Taylor. The Nebraska statute is as follows:

"No person having a direct legal interest in the result of any civil action or proceeding when the adverse party is the representative of the deceased person shall be permitted to testify to any transaction or conversation held between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." Compiled Stats. 1887, Sec. 329.

Flanagan, having given defendant a warranty deed for the land in question, was clearly interested in the result of the suit.

Edward A. Taylor, son and heir of Edward B. Taylor, testified to several conversations with Flanagan, in which Flanagan asked him for permisson to stay upon the land, and to deed him the

land so it would revert to him and his sister at Flanagan's death. In this conversation Flanagan made no pretense that he owned the land, but only claimed that Edward B. Taylor had said to him that he could stay on the land until he, Edward B. Taylor, or some of the family wanted it. All this testimony, of course, John Flanagan recklessly contradicted.

Ella Arnold, daughter and heir of Edward B. Taylor, stated positively that her father permitted Flanagan to occupy the forty acres of land and use it for agricultural purposes only until such time as he or some of the family would want it.

At the conclusion of the testimony the plaintiff asked a number of instructions, all of which, except one, were incorporated into the charge of the court, and, as we claim, erroneously modified and qualified. The instruction refused by the court was as follows:

"The jury are further instructed that the mere cutting of grass or making hay upon the land in controversy is not sufficient to constitute adverse possession."

To the action of the court in refusing to give said instructions the plaintiff at the time excepted.

The judge charged the jury as follows:

"GENTLEMEN OF THE JURY: The plaintiff has asked me to give you several written instructions. Most of them are correct, and I will give them without qualification or amendment. Most of them seem to relate to the defendant's claim of title, and no reference seems to be made to any part of the

testimony on which the plaintiff bases his claim, and, in fact, there is so very little of that that I think it almost unnecessary to call the attention of the jury to it further than to say that, in my judgment as I view this case, the plaintiff has made out a good and perfect paper title to the land in controversy, and unless the defendant can show a superior title derived from or through one of the plaintiff's grantors the plaintiff would be entitled to recover. When I state the status of this case and call your attention to the testimony that is necessary to establish the truth of the several separate and independent propositions, I think I will have discharged my whole duty. The matter will then be for you and you alone to determine the rights of the parties as presented by the testimony.

"This case is different in some respects from some ejectment cases usually found in our courts, and in fact from the ones usually tried in any courts.

"The plaintiff has got to succeed, if he succeeds at all, when he brings a suit to recover possession of real estate, on the strength of his own title. He cannot rely upon the weakness of the title of the adverse claimant, but by virtue of his having a good and sufficient title himself on which he must rely. Now, the plaintiff has shown that he had such a title to the land in dispute in this case. He has shown all that would be necessary for him to show to justify the jury in finding a verdict in his favor if the defendant had introduced no testimony at all.

"In other words, he has shown a perfect paper title, as I think, and if the matter had stopped when his testimony was concluded it would have been the duty of the jury to find that at the commencement of this suit the plaintiff was the owner of the property and entitled to the immediate possession of the same.

"But this does not follow by any means in this case; it frequently occurs that the plaintiff has some defect in his title and the defendant may sit still and not move hand nor foot until a good title is shown by the plaintiff. A plaintiff must eventually fail if his title is defective; but where it is perfect he is entitled to recover unless the other side can show a superior one.

"As I have said, the plaintiff in this case has shown a good and perfect paper title, and if the defendant had introduced no testimony whatever the plaintiff would be entitled to a verdict. The plaintiff has done all that he was required to do to justify a recovery, until the def't was required to act after he has done that. If the defendant can succeed at all he has got to succeed on the strength of his own title.

"*The plaintiff need not show defects, because the defendant himself must establish the fact that he is the owner of the legal title to the premises in dispute before he can defeat the plaintiff's right to recover; and the plaintiff having established his right and shown his title, making out what we call a prima facie case, and it only appearing from the papers that have been introduced in evidence that his title was good, unless the defendant satisfies you by a preponderance of proof that Flanagan claimed under Taylor and went into possession and remained in possession for a period of ten years, then the plaintiff is entitled to recover.* As I said, all the instructions asked for the plaintiff relate mainly to the possession of Flanagan, under which the title for the defendant is claimed, and that will virtually dispose of the whole controversy, as I think. I am not prepared to say that I ought to go to the extent of justifying and sustaining all that is stated in the written instructions asked for."

"The jury are instructed that the rightful owner of the land is deemed in law to have the possession until he is ousted from it or dispossessed."

"In order that a title by adverse possession may defeat a legal title, such possession must have been continued uninterruptedly for ten consecutive years."

"In order that possession of land may be deemed adverse to the true owner, there must be a concurrence of the following elements:

"Such possession must be actual, hostile, exclusive, open, notorious and continuous for the whole period of ten years. Every element in this enumeration is absolutely essential, and if one of these elements does not exist there can be no adverse title acquired."

"A permissive possession can never become an adverse possession, because it lacks the element of hostility. If, therefore, the jury from the evidence believe that Flanagan, between the years 1864 and 1868, took possession of the land in controveray under a license given him by the then owner, Ed. B. Taylor, his possession could not be considered as adverse until a distinct disclaimer of holding under such license was brought to the notice and knowledge of Edward B. Taylor or his subsequent representatives."

"Such an agreement would constitute a tenancy determinable at the will of the landlord, and so long as such tenancy existed."

"A verbal sale of real estate is absolutely void so far as conferring any title upon the purchaser. The claim, therefore, of the defendant's grantor, Flanagan, that in the lifetime of Edward B. Taylor he, Flanagan, made a verbal purchase of the property in dispute, can only be considered by you as a

basis for a claim of title by said Flanagan, which is also a necessary element in adverse possession."

"The jury are instructed that there has been no adjudication of the title between Flanagan and the representatives of Edward B. Taylor. The records of the various judgments rendered before justice of the peace and the County Court of Douglas County in action of trespass and forcible detainer do not amount to adjudication of title. The courts before which such proceedings were had are courts of inferior jurisdiction, having a power to pass upon the title of real property; and where questions of title are raised in said courts it may become the duty of the justice or judge before whom such litigation is tried to dismiss the case for want of jurisdiction to pass upon the questions involved. You are instructed that the only consideration you can give to such records is to establish dates or the fact that Flanagan was at such time or times in the possession of the property therein described."

"The jury are further instructed that if, before the lapse of ten years of adverse possession by said Flanagan, said Flanagan shall have accepted a lease of said premises from the true owner, or a sub-lease from the tenant of the true owner, such acceptance and leasing prevents the running of the statute and your finding must be for the plaintiff."

"The jury are further instructed that the word 'continuous' in the definition of adverse possession already given means that for the full period of ten years the possession must have been uninterrupted, actual, open and notorious. If, therefore, during any time during said ten years the jury shall further find that there was a break in such possession, or that said premises were not in the possession of any one for one or more years during

that time, then the same was not continuous and your verdict must be for the plaintiff."

"The jury are instructed that all acts or admissions made by said Flannigan before his sale and conveyance to defendant, and all the circumstances surrounding this case may be taken into consideration in determining the good faith of his claim and the character of his possession."

"I believe that disposes of the written instructions that I ought to give on that point, and as they are not quite as full as they ought to be I propose to go outside of what is there stated and give one on my own motion."

"*Where a party claims title by virtue of his own possession for a period of ten years, and where he claims his title by virtue of an arrangement stated to have been made with or through the owner, a verbal one, and the party went on the premises and took possession of the same in consequence of making that agreement and continues in possession for the space of ten years, it makes his title good as against all the world unless there is something done or said by himself that would affect his own right. It is wholly unnecessary to constitute possession for a person to go on the premises and live there either by himself or with his family, but if he goes on and takes possession, fences it, or exercises rights or ownership over it so as to come within the definition of the term as I have given it, that is sufficient. It would be unnecessary for him to live upon it a day. If he occupies it and excludes all others from occupancy of the same and claims it as his own by virtue of an arrangement made with the owner so that he would have color of title he may keep possession, and if he does from the time he first acquired it it is wholly immaterial*

whether he lives upon it a day if he exercises the rights of ownership so that his possession is open, notorious, continuous, and exclusive for ten years. Apply that rule to the facts here and it will be the duty of the jury to say whether Flanagan took possession of the property, claiming it under an arrangement with Mr. Taylor, who, it is stated, at one time owned it, and whether he kept possession of the property, and whether his possession was open, visible, and notorious so as to come within the rule I have stated, for the period of ten years from the time he took possession until the statute of limitations had run in his favor. You have to say from the testimony what the truth of the matter is, and in doing that I confess that I cannot say anything more that will help you out. You have to find that from the testimony the best way you can. The testimony is exceedingly contradictory. *Witnesses come here and say that in 1870, 1871, 1872, 1873 and 1874 nobody lived on the land; that there was no house nor any dugout and no cultivation; that it was not fenced; others say that it was taken possession of and occupied long prior to that and continued in possession for a period of more than ten years.* I have seen and heard a great deal in court in my short time, and I have seen enough to know that when parties and witnesses differ about time they may differ honestly, but where they differ as they differ here all of them cannot be correct. Some of them are evidently mistaken about the time, and, as a rule, where testimony is contradictory witnesses will differ more about the matter of time and distance than on any other subject on which they testify; that has been my experience. Though witnesses may and do differ they may be entirely honest, but all of them cannot be correct. Some of them must be mistaken, and it is the duty of the jury to say which set of witnesses who testi-

fied on that particular subject are to be believed and who are to be disbelieved. Now, how are you to determine that? Of course, you have to say from what you have seen and what you have heard which set of witnesses are the more reliable, which are interested in the general result and which are not, how the witnesses conducted themselves on the stand—how they behaved on the stand—whether they testified frankly without equivocating or attempt to withold or keep back a part of the truth. See how they conduct themselves on the stand. I think that is about as good a way to discover the credibility of the witness as any. Apply that rule to all the witnesses testifying, and see what opportunities they had to see and know the truth about which they testify, whether they are biased and interested or whether there is anything in the way to prevent them from telling the whole truth as viewed from their particular standpoint. When the defendant sets up a claim of title as has been done here, the plaintiff having shown a good one, unless the defendant has shown a better title it is incumbent upon the defendant to satisfy you of the truth and correctness of his claim, and that by a preponderance of proof. When the defendant asserts his own title he has got to establish the validity of that the same as the plaintiff would have to establish the validity of his.

As I have stated to you the burden of proof is, in the first instance, on the plaintiff. The burden of proof, after the plaintiff has made a good paper title, is shifted and the defendant has to satisfy the jury that his title is good to the exclusion of the other party. I have been asked by the plaintiff to give these instructions, which, as I think, are correct and there is no objection to giving them, although they were not presented in time. If my attention

had been called to them they would have been given without being written out:

"The jury are instructed that at common law an interested witness was incompetent to testify to any conversation or transaction with a deceased person in a controversy where such a witness and the representatives of the deceased person were opposed. The reason for excluding such evidence was the temptation to testify falsely and the difficulty of disproving."

"You are permitted to take this into consideration in estimating the credit to be given to such evidence."

"The court instructs the jury that the burden of proof is on the defendant to show the continuous, open and adverse possession of the land in question for ten years and he must show that by clear and satisfactory evidence."

"The court instructs the jury that they are the sole judges of the weight of testimony and the credibility of witnesses, and if they believe any witness had wilfully sworn falsely to any material facts in issue they are at liberty to disregard his entire testimony, agreeable to the legal maxim, 'False in one thing false in all.'

"That is the same as hereby given—that is, the burden of proof after the plaintiff has shown his paper title as he has, rested on the defense—and if he does not satisfy the jury by a fair preponderance of the proof, after the entire consideration and comparison of all the testimony, that his title is good, then, of course, the plaintiff is entitled to recover."

"The court instructs the jury that they are sole judges of the weight of testimony and the credibility of the witnesses, and if they believe that any witness has wilfully sworn falsely to any material

facts in issue they are at liberty to disregard his testimony according to the legal maxim "False in one false in all."

I have given that instruction with that modification that if the jury are satisfied that a witness has sworn falsely on the trial of this cause about a matter that is material to the issues they are not only at liberty to reject, but they ought to reject his testimony, unless corroborated by other and more satisfactory proof, because the testimony of witness who will sit on the stand and wilfully and deliberately falsify is entitled to no credit at all, and his testimony ought to be totally rejected and utterly ignored, unless supported by more and satisfactory proof. With that addition I give that instruction. If you find under the testimony that the plaintiff is entitled to recover the premises in dispute, your verdict ought to be: 'We, the jury, find that at the time of the commencement of this suit the plaintiff was the owner of the premises in dispute and entitled to the immediate possession thereof.' *But if you take the other view and find that the defendant has a good title and that he is entitled to recover, then I think you ought to go further and find the fact that he entered into the possession of the premises at a certain time, or as near as you can fix it from the testimony; that he occupied the premises; that he continued in possession for more than ten years prior to the commencement of this suit, which was December 4, 1886. You ought to find, if you can from the testimony, about the time he went into possession, whether he continued in possession, and whether his possession was adverse, continuous and hostile prior to the commencement of this suit, or whether Flanagan and his grantees, defendants in this suit, continued in possession that long, because if Flanagan himself and his repre-*

sentatives continued in possession that long it is the same as if Flanagan was in possession that long himself."

"If you find for the defendant, find when he took possession if you can, and as near as you can how long he remained in possession before the commencement of this suit. Then your verdict will be in addition to that: 'We therefore find that at the commencement of this suit the defendant was the owner and entitled to the immediate possession of the premises in dispute.' That disposes of the whole controversey as far as the verdict of the jury is concerned."

The foregoing contains the entire instruction to the jury. Rec. pp. 189 to 194.

The parts of the charge printed in italics indicate the portion thereof excepted to at the time by the plaintiff.

The jury on December 9, 1887, returned the following special verdict on which judgment was entered for the defendant:

"We, the jury empaneled and sworn to try the issues joined in the above entitled cause, do find and say that one John Flanigan in the year 1868 entered into the possession of the west one-half of the northeast quarter of the southwest quarter of Section 4, in Township 15 north of Range 13 east of the sixth principal meridian, in Douglas County, Nebraska, being the land in controversy in this case, under a claim of ownership thereto, and that he remained in the open, continued, notorious and adverse possession thereof for the period of sixteen (16) years thereafter, and until he sold and transferred the same to the defendant in this case.

"We further find that said John Flanigan and

Julia, his wife, by good and lawful deed of conveyance, conveyed said premises to the defendant in this suit in 1885, and surrendered his possession to this defendant, and that said defendant has remained in the open, continued, notorious and adverse possession of the same under claim of ownership down to the present time. We therefore find that at the commencement of this suit the defendant was the owner of and entitled to possession of the said premises, and upon the issues joined in this case we find for said defendant." Rec. p. 7.

The following are the statutory provisions of Nebraska relating to verdicts:

SEC. 292. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

SEC. 293. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal.

SEC. 294. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

Compiled Statutes of Nebraska, 1887.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns the following manifest errors of the court below:

I.

The court erred in rendering a judgment on the special verdict of the jury.

II.

The court erred in refusing to permit Warren Cochran, witness for defendant, to answer certain questions asked him on cross-examination, and in ruling out the following anonymous letter written by him to the plaintiff:

"Return to Joseph Collins, care H. E. Cochran, 1509 Farnum street, Omaha, Neb., if not delivered in ten days. Mr. Seth E. Ward, Westport, Jackson County, Mo. Omaha, Neb., Feb. 25, '86. Mr. Seth E. Ward, Westport, Mo. Dear Sir:—Being a new comer in Omaha, I am looking about for a piece of land, 15 or 20 acres, near the city, for fruit and market garden purposes; am told you have a piece out near the Fort, the west ½ N. E. ¼ S. W. ¼, Sec. 4, T. 15, R. 13, that might answer my purpose. I write to inquire if that is so. Would you sell it, and at what price? Can

you give a good title, and is it free from all encumbrances? Will you do me the favor to reply at once, as it is near time to commence preparing for gardening plants? I don't wish to rent; I wish to buy and pay cash; so please give me your very lowest figures. Direct to Joseph Collins, Omaha, Neb., care of H. E. Cochran, 1509 Farnum street. Very respectfully, Joseph Collins."

III.

The court erred in not permitting Julia Flanagan to answer questions put to her on cross-examination, as to whether she had rented the land in dispute from Housel and Allen, agents of Ward.

IV.

The court further erred in refusing to permit Julia Flanagan to answer the question put to her on cross-examination, as to her renting a portion of the land in question from Elton.

V.

The court erred in admitting in evidence the records and exhibits in the case of Forcible Entry and Detainer, before the County Court of Douglas County, wherein Seth E. Ward was plaintiff and Jacob Elton, John and Julia Flanagan were defendants.

VI.

The court erred in refusing to give the following instruction requested by plaintiff:

"The jury are further instructed that the mere cutting of grass or making hay upon the land in controversy is not sufficient to constitute adverse possession."

VII.

The court below erred in charging the jury on its own motion, as follows, to-wit:

"The plaintiff need not show defects, because the defendant himself must establish the fact that he is the owner of the legal title to the premises in dispute before he can defeat plaintiff's right of recovery; and the plaintiff having established his right and shown his title, making out what we call a *prima facie* case, and it only appearing from the papers that have been introduced in evidence that his title was good, unless the defendant satisfies you by a preponderance of proof that Flanagan claimed under Taylor and went into possession and remained in possession for a period of ten years, then the plaintiff is entitled to recover." Rec. p. 189.

VIII.

The court erred in charging the jury on its own motion as follows, to-wit:

"Where a party claims title by virtue of his own possession for a period of ten years and where he claims his title by virtue of an arrangement stated to have been made with or through the owner, a verbal one, and the party went on the premises and took possession of the same in consequence of making that agreement, and continues in possession for the space of ten years, it makes his title good as against all the world, and unless there is something done or said by himself that would affect his own right."

IX.

The court erred in charging the jury of its own motion as follows, to-wit:

"It is wholly unnecessary to constitute possession for a person to go on the premises and live there either by himself or with his family; but if he goes on and takes possession, fences it, or exercises the rights of ownership over it so as to come within the definition of the term as I have given it, that is sufficient; it would be unnecessary for him to live upon it a day. If he occupies and excludes all others from occupancy of the same and claims it as his own by virtue of an arrangement made with the owner, so that he would have color of title, he may keep possession, and if he does from the time he first acquired it, it is wholly immaterial whether he lives upon it a day if he exercises the rights of ownership so that his possession is open, notorious, continuous and exclusive for ten years. Apply that rule to the facts here, and it will be the duty of the jury to say whether Flanagan took possession of the property claiming it under an arrangement with

Mr. Taylor, who, it is stated, at one time owned it, and whether he kept possession of the property, and whether his possession was open, notorious and visible so as to come within the rule I have stated for the period of ten years from the time he took possession until the statute of limitations had run in his favor. You have to say that from the testimony; and in doing that I confess I cannot say anything that will help you." Rec. p. 192.

X.

The court erred in charging the jury of its own motion as follows, to-wit:

"But if you take the other view and find that defendant has a good title and that he is entitled to recover, then I think you ought to go further and find the fact that he entered into the possession of the premises at a certain time, or as near as you can fix it from the testimony; that he occupied the premises; that he continued in possession for more than ten years prior to the commencement of this suit, which was December 4, 1886. You ought to find, if you can, from the testimony about the time that he went into possession, whether he continued in possession and whether his possession was adverse, continuous and hostile prior to the commencement of this suit, or whether Flanagan and his grantees defendants in this suit, continued in possession that long, it is the same as if Flanagan was in possession that long himself.

"If you find for the defendant, find when he took possession, if you can, and as near as you can how long he remained in possession before the commencement of this suit. Then your verdict

will be in addition to that, 'We therefore find that at the commencement of this suit the defend was the owner and entitled to the immediate possession of the premises in dispute.' That disposes of the whole controversy as far as the verdict of the jury is concerned." Rec. p. 194.

BRIEF.

I.

The Court erred (1st Assigned Error) in rendering a judgment for Defendant on the special verdict of the jury.

The special plea of adverse possession set up in the defendant's answer omitted to allege that the possession of the defendant and those under whom he claimed was exclusive.

The special verdict of the jury fails to find that the possession of Flanagan and defendant was *actual* and *exclusive*. As shown in our abstract, it appears from the evidence. and, as we contend, the undisputed evidence, that during certain years after Flanagan claims to have first

gone upon the land, he did nothing upon it except cut hay; that it was used as a common herding and grazing place for the cattle of others; that Julia Flanagan was in possession under a lease from plaintiff from 1878 to 1879, and that Jacob Elton was in possession under a lease from plaintiff from 1879 to 1885. It is certainly true that if the actual and exclusive features of Flanagan's possession were broken, then the statute of limitations ceased to run. It is settled by all the authorities that in order to establish title by adverse possession, where there is no color of title, as in this case, that the possession must not only be adverse, continuous, open and notorious, but must also be *actual* and *exclusive*.

To constitute adverse possession, there must be: First: An entry upon the land under a claim of title or ownership adverse to that of the true owner. Second: Hostile, actual, open, exclusive and continuous possession for the period of time prescribed by the Statate of Limitations. Each of these elements is essential to be proved, and a failure to establish any one of them is fatal.

Cook v. Babcock, 11 Cush. 208.
Harvey v. Tyler, 2 Wall. 349.
Bradstreet v. Huntington, 5 Pet. 440.
Ricard v. Williams et al, 7 Wheat. 59.
Armstrong v. Morrill, 14 Wall. 145.

Foulke v. Bond, 41 N. J. 527.
Deputron v. Young, 134 U. S. 254.
Unger v. Mooney, 63 Cal. 586.
Core v. Faupel, 24 W. Va. 238.

In *Foulke v. Bond*, *supra*, it is said:

"The principles on which the doctrine of title by adverse possession rests, are well settled. The possession must be actual and exclusive—adverse and hostile—visible and notorious—continued and uninterrupted. Notoriety of the adverse claim under which possession is held is a necessary constituency of title by adverse possession, and therefore the occupation or possession must be of that nature that the real owner is presumed to have known that there was a possession adverse to his title, under which it was intended to make title against him."

In *Armstrong v. Morrill*, 14 Wallace 120, Mr. Justice CLIFFORD, in delivering the opinion of the Supreme Court of the United States, among other things, said:

"* * * It is well-settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive and adverse. *Cook v. Babcock*, 11 Cush., 210. Such a possession, it is conceded, if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee and bars the right of recovery. Independently of positive statute law, such a possession affords a presumption that all

the claimants to the land acquiesce in the claim so evidenced and enforced, or that they forbear for some substantial reason to controvert the claim of the possessor or to disturb him in the enjoyment of the premises. Secret possession will not do, as publicity and notoriety are necessary as evidence of notice, and to put those claiming an adverse interest upon inquiry. *Bradstreet v. Huntington*, 5 Pet. 402; *Blood v. Wood*, 1 Met. 528; *Ewing v. Burnet*, 11 Pet. 53. Mere occupation is not sufficient, but the possession must be adverse, as seizin and possession are supposed to be co-extensive with the right, and that the possession continued till the party is ousted thereof by an actual possession in another under a claim of right. Ang. Lim., 377; *Clarke v. Courtney*, 5 Pet. 354; *McIver v. Ragan*, 2 Wheat. 29; *Kirk v. Smith*, 9 Wheat. 288.

"Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the Statute of Limitations. Whenever a party quits the possession, the seizin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseizin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the Statute of Limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the Statute a new adverse possession for the time limited must be taken for that purpose. *Brinsfield v. Carter*, 2 Kelly (Ga.) 143; *Ringgold v. Malott*, 1 H. & Johns. 316; *Hall v. Gittings*, 2 H. & Johns. 112."

In 3rd Washburn on Real Property, 5th Edition, at page 145, we find the following language:

"In the first place, inasmuch as the title of the true owner may, by the application of this statute, be often divested by the wrongful act of another, the law is stringent in requiring clear proof of the requisite facts. There must be, *first*, an *actual* occupancy, clear, definite, positive and notorious; second, it must be *continued, adverse and exclusive* during the whole period prescribed by the statute; third, it must be with an intention to claim title to the land occupied, or, in other words, the fact of possession, and the *quo animo* it was commenced and continued, are the only tests. If, therefore, the intention is wanting of claiming against the true owner, the possession of a tenant will not be adverse, nor, however long continued, bar the owner's right of entry."

* * * * *

"And a case illustrative of what is required to make a possession exclusive within the meaning of the law, was where a fisherman took possession of an island which had formed in a navigable river, and occupied it for a sufficient length of time to acquire title to it if his possession had been exclusive; but as it was shown that it was used by any one who had occasion to go upon it for fishing as public property, it did not give him any title to the same." Id. p. 160.

In 3 Wash. Real Prop., 5th Ed., at page 148, the author says:

"The tenant, therefore, must remain permanently on the land, or else occupy it in such a way as to leave no doubt on the mind of the true owner not only who the adverse claimant is, but that it is his purpose to keep him out of his land. Nor will it be sufficient that, when leaving the land, the tenant has a secret purpose and intent

to return at his convenience, sooner or later, and re-occupy the land. If, therefore, there is any period during the twenty years in which the person having the right of entry could not find an occupant on the land on whom he could bring or sustain his ejectment, technically called, 'the tenant to the proecipe,' that period cannot be counted against him as part of the twenty years. * *"

In Angell on Limitations, 6th Ed. at Sec. 392, it is said: "The occupation must in fact be visible and notorious, inasmuch as the statute proceeds upon the ground that there has been an acquiescence on the part of the owner of the land, a ground of supposition which can never exist if an occupation be so clandestinely taken as not to afford notice of the same. It is therefore incumbent upon the person claiming the land by virtue of possession to show an actual occupation and appropriation of what he so claims within some definite boundaries. 'One point,' says SHAW, C. J., 'seems to be well settled, which is that very strong acts of exclusive possession, such as building, enclosing or cultivating and that for a long time and openly and notoriously, are necessary in order to constitute an actual ouster of the true owner who has no notice of such acts. *Blood v. Wood*, 1 Met. 528.'"

All the authorities concede that the possession must be of a different character from that which marks the conduct of a mere trespasser.

It must be so open, notorious and unequivocal as to impart notice to the world that it is under an *exclusive* claim of right made by the pos-

sessor, and that the right of the true owner is invaded and denied with an intention on the part of the occupant to assert a claim of title adverse to his.

Beatty v. Moore, 30 Md. 409.
Unger v. Mooney, 63 Cal. 586.
Carroll v. Gillion, 33 Ga. 539.
Musick v. Barney, 49 Mo. 458.
Samuel v. Bowerscale, 104 Mass. 207.
Townsend v. Little, 109 U. S. 511.

It is well settled law that the doctrine of adverse possession is to be taken strictly, and not to be made out from inference but from clear and positive proof. The possession must be such as to show clearly that the party claims the land as his own openly and *exclusively*. Every presumption is in favor of possession in subordination to the title of the true owner.

Coburn v. Ollis, 3 Met. 125, 128.
Jackson v. Sharp, 9 John. 167.
Huntington v. Whaley, 29 Conn. 391.
Cook v. Babcock, 11 Cush. 209.
Sidnor v. Palmer, 29 Wis. 229.
Weaver v. Wilson, 48 Ill. 125.
Jackson v. Berner, 48 Ill. 203.
Cornelius et al. v. Giberson, 1 Dutch 1.

In *Cook v. Babcock*, *supra*, it is said:

"Where a party claims by a disseizin ripened into a good title by the lapse of time as against the legal owner, he must show *actual*, open, *exclusive* and adverse possession of the land. All these elements are essential to be be proved, and failure to establish any one of them is fatal to the validity of the claim. In weighing and applying the evidence in support of such a claim, the acts of the wrong doer are to be construed strictly, and the true owner is not to be barred of his right except upon the clear proof of an *actual* occupancy, clear, definite, open and notorious."

In *Huntington v. Whaley*, *supra*, the court said: "The doctrine of adverse possession is to be taken strictly. An adverse possession is not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner."

To the same effect is *Jackson v. Sharp*, *supra*.

In *Cornelius et al. v. Giberson*, *supra*, it was said:

"It is a settled rule that the doctrine of adverse possession is to be taken strictly; it is not to be made out from inference, but by clear and positive proof. Every presumption is in favor of subordination to the title of the true owner. A party claiming title by adverse possession always claims in derogation of the right of the real owner. He admits that the legal title is in another; he rests his claim not upon a title in

himself as the true owner, but upon holding adversely to the true owner for the period prescribed by the statute of limitations. Claiming a benefit from his own wrong, his acts are to be construed strictly."

There can be no dispute that the law is, that where a special verdict is rendered, all the facts essential to entitle a party to a judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous, and the error appearing on the face of the record proper can be taken advantage of in this court, though not raised below.

In *Prentice et al. v. Zanes, Administrator*, 8 How. 470, this court said:

"In the *Chesapeake Insurance Co. v. Stark*, (6 Cranch, 268), and *Barnes v. Williams*, (11 Wheaton, 415) this court have decided that where in a special verdict the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below with directions to award a *venire de novo*."

In *Hardin v. Fisher*, 1 Wheat. 300, it was held that where a special verdict does not find all the facts necessary to a decision, judgment will be reversed and a *venire de novo* will be awarded.

The foregoing authorities make it perfectly

clear that the court below erred in rendering judgment upon the special verdict returned by the jury in this case.

II.

The Court erred (2d assigned error) in refusing to permit Warren Cochran, witness for defendant, to answer certain questions asked him on cross-examination, and in ruling out the anonymous letter written by him to Plaintiff.

This witness was the father of defendant. He testified as to Flanagan being in possession of the premises in question in November, 1885, the date when defendant purchased the land, and as to the kind of house and stable that was on the land. He also testified that he and his son since that time had been and were still occupying and cultivating the land, and that the original deed to his son had been left for record. The plain object and purpose of this testimony was to support the alleged adverse possession of Flanagan and the defendant.

On cross-examination the witness was asked:

Q. You say this deed is taken in the name of your son—what do you mean by that? Who was it that conducted the negotiations with Flanagan for the transmission of this title?

Defendant's counsel objected to this question as irrelevant and immaterial, and the objection was

sustained, and plaintiff excepted. The further question was asked him by plaintiff's counsel on cross-examination:

Q. Have you ever made any overtures since the purchase of this title from Flanagan to buy the title of non-resident, Mr. Ward?

The same objection was made by defendant's counsel and sustained, and plaintiff excepted.

Subsequently the witness was asked if he knew Joseph Collins, and he said he had known such a man in Vermont. He was then shown an envelope addressed to the plaintiff, and a letter therein signed in the name of Joseph Collins—and said that letter and signature were in his handwriting. On the outside of the envelope were directions to return the letter to Joseph Collins, care of H. E. Cochran, Farnham Street, Omaha, Nebraska, if not delivered in ten days. The letter was addressed to Mr. Ward, the plaintiff, at Westport, Jackson County, Missouri, and was dated February 25, 1886. The letter is set out *in haec verba* in our statement *supra*, p. 45.

This letter was offered in evidence as part of the cross-examination of the witness, but objection was made to it and objection sustained, and the plaintiff excepted. The letter is a distinct recognition of plaintiff's title to the land in controversy, and states in terms that the writer understands that the plaintiff

owns the land, and asks at what price he will sell it; and if he can give a good title; and if it is free from encumbrance; asks for a favorable reply at once, as it is near time to commence gardening; states that the writer does not want to rent, that he wishes to buy and pay cash, and asks for the very lowest figures; and concludes by requesting that the answer be directed to Joseph Coliins, Omaha, Nebraska, care of H. E. Cochran, 1509 Farnham street. It is signed "Joseph Collins."

We contend that this witness should have been required to answer the questions put to him, and that this letter should have been admitted in evidence as part of his cross-examination. The plaintiff was certainly entitled to show by this witness, who had, with his son, been in possession and cultivating the land since his purchase from Flanagan, that he had not claimed it adversely; that he did not understand that Flanagan owned it, but did understand that Ward was the owner.

The questions which preceded the fixing of responsibility of the letter upon this witness were directed to the point whether the witness did not really own the land. Whether he had not paid the purchase money for it and, substantially, whether he was not the owner. It appears from the record that the defendant did not testify in the case at all.

We submit that if cross-examination has any office to perform in the administration of justice in the courts of the land, that these questions put to this witness were vital and important. It appears that the witness was a dealer in tax titles, and had previously been a preacher. He was, therefore, unquestionably intelligent, and must have acted from method. It cannot be inferred that he was simply an intruder into his son's affairs, or that he was attempting to buy this property from Ward over his son's head. If this question had been answered and this letter introduced, in every human probability there would have been a different result reached by the jury. The testimony is of the mose vital and imporant character. We have the right to assume, in arguing this branch of the case, that the question, if answered, would have been against the defendant, and would have shown that this witness was the real owner of the land. That his money had bought it; that his son held it for him; that he was in the possession of it, cultivating and enjoying it, and that he knew that Ward had title to it, and that the title in Flanagan was not good. Above all, this testimony was proper to show the interest of this witness. While parties in interest are permitted to testify under the liberal provisions of modern statutes, yet it is the policy of the law to permit the most rigid and searching

cross-examinations to show what interest, if any, they may have in the controversy, direct or indirect, with a view of permitting the trier of the facts whether court or jury pass upon their credibility. The most powerful lever which brings false testimony into a court is that of self-interest, and when an interested witness testifies, inquiry can always be made as to the nature and extent of his interest, with a view of determining the credibility of his testimony. If the questions preceding the identification of this letter had been answered, we would have undoubtedly shown that the witness was the real owner of the land, and that by this letter he had recognized Ward's title—or at least that he was conscious that Flanagan's title was not good.

The letter is a dishonest and misleading one. If the writer had been a fair and upright man he would have written plainly to Mr. Ward, under his own name, or as the agent of his son, if he was such agent, and have stated the facts, that he had purchased Flanagan's title which he understood to be good; that Ward was the owner of the title of record, and would have asked to buy it with a view of putting his own title beyond any question. Instead of doing this he writes a misleading letter; he writes under another name; and, as conscious of his guilt, he puts upon the envelope and into the body of the letter directions that it be returned to Omaha,

care of H. E. Cochran—which were not the initials of either himself or his son. He evidently intended that the letter, if it did not reach Ward, should come back to his own hands. He does not profess to have written the letter as the agent of Collins. It is apparent that he used the name of Joseph Collins, because he had known such a man many years before way off in Vermont, and there was no other Joseph Collins around Omaha, and the letter or an answer would come back to his own hands, and never reach any Joseph Collins.

In discussing this branch of the case it is difficult for us to use temperate language. We undertake to say that nothing can be plainer than that the questions and letter were proper cross-examination; and if they had been answered, the defendant's case showing adverse possession between November, 1885, and the date of the suit, would not have been at all sustained; for answers to the questions either would have shown that this witness was the real owner of the land, or the agent and representative of his son, the defendant, or that he was attempting to overreach his own son, and in either event the witness would have been so discredited that the defendant would have had at least to have introduced other witnesses to prove his possession from the date of Flanagan's deed to the time of the commencement of the suit.

There is another view in which this testimony was all-important. It is settled law that a recognition by a party in possession, claiming adversely of the true owner's title, suspends the running of the statute of limitations, and an offer on the part of the adverse claimant to purchase the property which he is holding adversely from the plaintiff within the statutory period is a clear recognition of plaintiff's title and will interrupt the running of the statute.

Jackson v. Britton, 4 Wend. 507.

Jackson v. Cuerden, 2 Johns., cases 353.

Lovell v. Frost, 44 Cal. 474.

Central Pacific R. R. v. Stroup, 63 Cal. 150.

III.

The court erred (3d assigned error) in not permitting Julia Flanagan to answer questions put to her on cross-examination as to whether she had rented the land in dispute from Housel & Allen, the agents of Ward.

Subsequently Housel and Allen positively testified on behalf of plaintiff that Mrs. Flanagan had executed and delivered to them a written lease for the premises in question for the year April 1, 1878, to April 1, 1879, and had given a note for the rent and a chattel mortgage on some personalty to secure the same. On cross-examination she was asked:

"Q. Did you give a chattel mortgage on some of your property to Mr. Allen for the purpose of securing the rent that John agreed to pay them for the use of the property?"

The defendant objected to this question, and the court sustained the objection. This was certainly proper cross-examination. In her examination in chief she had attempted to testify that John Flanagan had been in possession of this land claiming it as his own for a number of years, and that no one else had been in possession. Was it not proper cross-examination, to ask her if she herself had not rented the land for a year and executed a chattel mortgage to secure the rent, whether for the purpose of contradicting her, or as a basis for impeaching her testimony? Housel and Allen's testimony was to the effect that she executed this chattel mortgage in the presence of John Flanagan. Subsequently, after she had gone off the witness stand, she was recalled and asked by defendant's counsel whether she had ever executed the chattel mortgage to secure the rent on this land, and she said she had not. This, however, did not correct the error that was committed by the judge in refusing to permit her to answer the question put to her on cross-examination.

IV.

The court further erred (4th assigned error) in refusing to permit Julia Flanagan to answer the question put to her on cross-examination as to her renting a portion of the land in question from Elton.

The question asked her on cross-examination was:

"Q. Did you agree to pay Mr. Elton any money for the privilege of staying there one year on one acre of ground?"

The defendant objected and the court sustained the objection, and plaintiff excepted at the time.

This witness had attempted to testify that she and her husband, John Flanagan, had been continuously in possession of the land in question for many years, her husband claiming it as his own. Elton subsequently positively testified that he rented Julia Flanagan one acre of the land in dispute comprising that on which the house of the Flanagans was situated, for one year, 1883 to 1884, for five dollars. It was certainly proper cross-examination to ask this question. On what ground the objection was sustained, we are unable even to conjecture. It was plainly a proper question on cross-examination, whether for the purpose of contradicting her or as a basis for impeaching her testimony.

V.

The court erred (5th assigned error) in admitting the record and exhibits in the case of forcible entry and detainer before the County Court of Douglass County, wherein Seth E. Ward was plaintiff, and Jacob Elton, John and Julia Flanagan were defendants.

The complaint in the forcible entry and detainer case averred that Elton entered upon the premises as the tenant of Ward, and that John and Julia Flanagan entered thereon as the tenants of Elton, and that the tenancy had expired on April 1, 1885.

Attached to this record was the testimony introduced in the case, including an abstract of the testimony of certain witnesses for defendants, John and Julia Flanagan, and the docket entries in the criminal case of the State of Nebraska against Jno. Flanagan for trespassing on the land. In the forcible entry and detainer case and the criminal case there were verdicts for defendant. The court admitted this record and exhibits over plaintiff's objection, for the purpose of showing an adjudication of the question of possession and adverse possession. The record of the case at bar shows that after this evidence was thus admitted that the offer was withdrawn as showing an adjudication. The mischief, however, had been done. The record was before the jury. Not only was the record proper before the jury, but also the attached abstract of the tes-

timony of defendants' witnesses. Under no view was this testimony proper. It was the rankest kind of hearsay evidence. There was no opportunity to cross-examine the witnesses. The parties to the forcible entry and detainer suit and to the state criminal suit were not the same as the parties to the one at bar. The issues were not the same. It is hard to conceive how testimony more prejudicial could have been introduced against the plaintiff. From the human nature of a jury of which an appellate court will take judicial notice, it is evident that they would attach great importance to testimony of this kind, when in fact it had no bearing upon the issues involved. It is true that the judge in his charge to the jury gave an instruction at the request of the plaintiff, wherein he assumed to modify the force and effect of this record; yet we submit the harm had been done, and was of such a substantial character that it could not, and evidently was not, cured by the charge of the court. The admission of the record with the accompanying exhibits was flagrantly erroneous, and unless this court can see that the error resulting therefrom was clearly corrected by the charge of the trial judge, prejudicial error must be presumed.

It will be noticed that the charge of the judge did not withdraw from the jury the consideration of the abstract of the testimony of defendants'

witnesses attached to the record. The judge's charge did not properly state the force and effect of the testimony. Of course, the plaintiff in asking the instruction was forced to ask it upon the theory that the judge had admitted the record for the purpose of proving adverse possession. The judge had originally admitted it for the purpose of proving adjudication of possession and adverse possession. Defendant had withdrawn it as evidence proving adjudication upon the question of possession. The plaintiff had excepted to the judge's ruling, allowing it to be introduced as showing adverse possession, and had the right to ask the judge to state that the record was not admissible as an adjudication. We contend that these records with the accompanying exhibits were not admissible at all. The only matter contained in them which, under any circumstances, could have been properly admitted in evidence against the plaintiff was his complaint in the forcible entry and detainer case wherein he stated that John and Julia Flanagan were in possession of the premises under a lease from Elton. If the judge intended to comment upon this testimony at all, and withdraw any part of it from the jury, he should have clearly indicated to the jury on what fact in issue the evidence could be by them considered. It would not have been proper for him to state that it was admitted

for the purpose of showing *adverse* possession in Flanagan. At most it could only be considered as showing possession in Flanagan. He should have stated that it could only be considered as a statement of the plaintiff to the effect that the Flanagans were in possession of the land as tenants of Elton, and that Elton was in possession as tenant of plaintiff. Certainly the plaintiff did not waive his objection to the admission of this evidence by asking an instruction upon it on the theory upon which the judge had admitted it. After the judge had ruled in the presence of the jury admitting the record and accompanying exhibits as showing an adjudication upon the question of possession and adverse possession, and after defendant had withdrawn it as showing an adjudication, it was only ordinary vigilance on the part of the plaintiff's counsel to have the jury's attention called to this withdrawal. So we submit that the judge erred in the admission of this evidence, and the error was not cured by his subsequent charge to the jury.

Huiskamp v. Moline Wagon Co., 121 U. S. 310.

VI.

The court erred (6th assigned error) in refusing to give the following instruction requested by plaintiff: "The jury are further instructed that the mere cutting of

grass or making hay upon the land in controversy is not sufficient to constitute adverse possession".

There was evidence, we have seen, tending to show that for the three or four years while Flanagan lived near the barracks and on the Denise farm, the only possessory act exercised by him over the land in dispute was cutting and making hay thereon. There was therefore evidence on which to base the foregoing instruction, and if it properly stated the law it should have been given. It must constantly be borne in mind that Flanagan had no color of title.

What constitutes adverse possession is a question of law; and if the evidence in the case, admitting its truth, does not show possession, it is the duty of the court so to declare.

Cornelius v. Giberson, 25 N. J. 31.
Blackburn v. Welsh, 44 Mo. 41.
Bradstreet v. Huntington, 5 Pet. 402.
Turner v. Baker, 64 Mo. 219.
Bowie v. Brahe, 3 Duer (N. Y.) 35.
Thompson on Trials, Vol. 1, Sec. 1409.
Third Washburn's Real Property, 152.

The court is bound to give an opinion on a question of law upon request, if pertinent to the issue.

Douglass v. McAllister, 3 Cranch. 298.
Chapman v. McCormick, 86 N. Y. 479.
Smith v. Carrington, 4 Cranch. 62.
Pennock and Sellers v. Dialogue, 2 Pet. 1.

That cutting or making hay upon land which is susceptible of cultivation is not sufficient to constitute adverse possession is made perfectly clear by the following authorities:

In *Musick v. Barney*, 49 Mo. 458, there was proof of the fact that one cut rails from a tract of land and paid taxes on it for several years, erected a temporary structure upon it, which he afterwards removed, and openly claimed it as his own, but it further appeared that he failed to occupy, inclose or improve it. It was held that these facts did not make out a case of adverse possession.

Judge BLISS, in delivering the opinion of the court in that case, said:

"The subject of adverse possession when there is no actual corporeal occupation of the land is not without difficulty, and courts have not found it easy to give a general statement of what in all cases may constitute such possession. With the short limitation we have in Missouri, it would endanger property rights to permit a loose claim to land, with such acts of ownership only as might be exercised without attracting the attention of the real owner, and without actual occupation, to ripen into title. In order to bar the true owner, the adverse possession relied upon is presumed to have been known and acquiesced in by him. It would be a fraud to deprive him of his property through a claim of which he not only knew nothing in fact, but which was not accompanied by acts that would, if he looked after his property, advise him of its existence. In visiting his land the indications of

the claim and possession should be so patent that he could not be deceived, so that if he remains in ignorance it is his own fault. Can this implied notice and acquiescence be predicated upon the facts above recited? Suppose the owner had visited the land, and especially after the cabin had been removed, would he have seen such evidences of possession of another as to warn him that his title was slipping away from him? And if so, was there anything to notify him as to who was the claimant? He might have seen that timber had been cut, but this of itself only shows a trespass, unfortunately too common to be regarded as evidence of a claim of ownership. The payment of taxes is an act of ownership, the strongest shown by the defendant, and had it been accompanied by any improvement of the property, would have greatly aided the claim."

In *Wheeler v. Spinola*, 54 N. Y. 337, an entry upon land once a year for over twenty years, and the cutting and removing of grass therefrom by a party who had not inclosed or cultivated it, was held not sufficient to confer title by adverse possession.

In *Townsend v. Reeves*, 44 N. J. 525, it was held that repeated cutting of timber from outlands will not give title by adverse possession.

In *Ozark Land Co. v. Leonard*, 20 Fed. Rep. page 881, the mere act of cutting timber on land and hauling it off was held not to constitute pos-

session, whether done under claim of title or not. In that case CALDWELL, J., said:

"But the mere act of cutting timber on land and hauling it off is not such possession of the land as will entitle the owner to maintain ejectment against the tresspasser. Occasional intrusions of this sort do not constitute possession whether done under claim of title or not. It is not a claim of title but 'possession' that the statute of this State makes essential to the successful maintenance of an action of ejectment. It is clear, the facts set out in the bill would not amount to adverse possession on the part of the defendant. 'The going upon land from time to time and cutting logs thereon does not give possession. Such acts are mere trespasses upon the land against the true owner, whoever he may be. * * * But it never was supposed that the hunter had possession of the forests through which he roamed in pursuit of game; and no more can a woodchopper be said to possess the woods into which he enters to cut the logs.' *Thompson v. Burhans*, 79 N. Y. 93; *Austin v. Holt*, 32 Wis. 478, 490; *Washburn v. Cutter*, 17 Minn. (Gil.) 335; 3 Wash. Real Prop. 133, 134. There is nothing on the record to show the land is not susceptible of actual occupation, cultivation and improvement.

In *Jackson v. Stoetzel*, 87 Pa. St. 302, it was held that mere digging of coal in winter upon property which is abandoned during the rest of the year, was not sufficient to constitute adverse possession.

In *Rivers v. Thompson*, 46 Ala. 335, it was said that cutting timber might be adverse

possession, but if the land was suitable for other purposes, such mere acts of occupation would not be sufficient.

In *Wilson v. Blake*, 53 Vt. 305, it was held that occupying a sugar place only for the purpose of making sugar, which place is separated from the home farm by intervening lands owned by others, is not actual or continuous possession.

In *Parley v. English et al.*, 5 Grat. p. 141, it it was held that a temporary possession of land by cutting and sawing timber upon it, is not such adversary possession as will give title.

In *Washburn v. Cutter*, 17 Minn. 735, it was held that cutting timber without actual occupancy or cultivation or inclosure where the land is capable of it, is mere trespass and not adverse possession.

In *Austin v. Holt*, 32 Wis. p. 478, it was held that a possession of land which is merely incidental and subsidiary to the commission of a trespass thereon, as by cutting and removing the timber, and which is abandoned when that object is accomplished although it may have continued for some weeks or months, is not adverse possession.

In *Parker v. Wallis*, 60 Md. 15, it was held that where all the defendant had done was to dig sand on and from the land from time to time and sell the same, his entries thereon for that purpose

were but successive acts of trespass against the true owner if he was not the owner himself.

The mere act of fencing has been held not to be evidence of an occupancy which can ripen into adverse possession.

Russell v. Davis, 38 Conn. 562.

Going upon land from time to time and cutting logs thereon does not give possession. Such acts are merely trespasses upon land against the true owner, whoever he may be.

Thompson v. Burhans, 79 N. Y. 99.

The fact that one cuts hay on unenclosed land, lets his cattle roam over and pasture upon it, just as they pastured upon adjacent unenclosed land, and prevents people from cutting and selling wood on the same, is not sufficient to constitute adverse possession.

Lambert v. Stees, 47 Minn. 141.

Acts of occupation of woodland by cutting wood and timber for use and sale and clearing for cultivation, running lines and marking them by lopping trees, and a sale of part of the land are not sufficient without any cultivation or fencing of the premises to constitute a disseizin, although such acts are with the knowledge of the owner.

Slater v. Jepherson, 6 Cush. 129.

Occasional cutting of grass is not sufficient to establish an ouster or proof that the party went upon the land to claim title.

Kennebec Purchase v. Springer, 4 Mass. 416.

Where one entered on land and cut logs, split boards and otherwise prepared for building a house on the land, but returned to his home which was in another county, and at the end of the succeeding year went back and finished the house and put his family in it, no other person having had possession during said interval, it was held that the statute of limitations did not run in his favor during such absence.

Byrne v. Long, 19 Ga. 27.

It was for the trial court to say whether or not cutting grass and making hay upon the land in controversy constituted adverse possession. This was one of the questions in the case, and the foregoing instruction requested by plaintiff was therefore pertinent to the issue, and it was error for the court to refuse to give the same.

VII.

The Court below erred in its charge to the jury.

See 7th, 8th, 9th and 10th assigned errors, *supra*, pp. 110-111.

In the Abstract *supra* pp. 95-105, we have set out the charge of the judge in full. We have put in italics the specific parts of the charge to which exception was taken.

In the Assignment of Errors, we have quoted under each assignment the part of the charge excepted to. *Supra* pp. 110-111.

We shall discuss all these exceptions to the charge under this division of our brief.

The charge embraces certain instructions which were asked by the plaintiff. In the beginning of the charge the judge said that he would give plaintiff's instructions without qualification or amendment. However, just before reading them to the jury, he said:

"I am not prepared to say that I ought to go to the extent of justifying and sustaining all that is stated in the written instructions asked for,"—and immediately after he read them to the jury, he said:

"They are not as full as they ought to be, and I propose to go outside of what is there stated and give one on my own motion."

So it is apparent, notwithstanding what was said in the charge, that the plaintiff's instructions as asked were not given without qualification and amendment, and it is needless to say that such qualification and amendment, coming from one who spoke to the jury as with the voice of

authority, were controlling. Indeed, the subsequent charge of the judge was, in many instances, squarely in conflict with plaintiff's instructions.

In the preliminary part of the charge, before reading plaintiff's instructions, the judge told the jury that plaintiff had made out a good paper title, and that the verdict must be for him unless the defendant had satisfied them "by preponderance of proof that Flanagan claimed under Taylor, and went into possession and remained in possession for the period of ten years "

Our first exception is addressed to this part of the judge's charge.

At the commencement of that part of the charge given by the judge on his own motion, he said:

"Where a party claims title by virtue of his own possession for a period of ten years, and where he claims his title by virtue of an arrangement stated to have been made with or through the owner—a verbal one—and the party went on the premises and took possession of the same in consequence of making that agreement, and continues in possession for a period of ten years, it makes his title good as against all the world, unless there is something done or said by him that would affect of his own right."

To this part of the charge our second exception is addressed.

Immediately following the above quoted part of the charge, the judge said:

"It is wholly unnecessary, to constitute possession, for a person to go on the premises and live there, either by himself or with his family; but if he goes on and takes possession, fences it or exercises rights or ownership over it so as to come within the definition of the term as I have given it, that is sufficient. It would be unnecessary for him to live upon it a day, if he occupies it and excludes all others from occupancy of the same, and claims it as his own by virtue of an arrangement made with the owner, so that he would have color of title, he may keep possession, and if he does, from the time that he first acquired it, it is wholly immaterial whether he lives upon it a day if he exercises the rights of ownership, so that his possession is open, notorious, continuous and exclusive for ten years. Apply that rule to the facts here, and it will be the duty of the jury to say whether Flanagan took possession of the property claiming it under an arrangement with Mr. Taylor, who, it is stated, at one time owned it, and whether he kept possession of the property, and whether his possession was open, visible and notorious, so as to come within the rule I have stated for the period of ten years from the time he took possession until the statute of limitations had run in his favor. You have to say from the testimony what the truth of the matter is, and in doing that, I confess that I cannot say anything more that will help you out."

To this part of the charge is directed our third exception.

The fundamental vice in the parts of the

charge just quoted, and to which our three first exceptions are addressed, is that they utterly ignore the vital and important question whether Flanagan's original taking possession of the forty-acre tract of land was under the oral contract of sale, which Flanagan claims to have been made and adverse to Taylor, or whether it was simply a permissive possession testified to by Edward A. Taylor and Ella Arnold and E. A. McClure, and sustained by all of the evidence in the case, except the unsupported testimony of John Flanagan himself. The judge in his charge said in substance that if Flanagan entered upon the land under an arrangement with Taylor, and stayed there for ten years, he acquired title. The jury's attention was not directed in the charge of the judge to the vital importance of the question under what arrangement Flanagan entered. Under the charge of the court the jury could have found for defendant, although they may not have believed Flanagan's story about the oral sale of the land; while the true view of the case is, that Flanagan's possession never became adverse in whatever light we consider the testimony, unless he in fact entered upon the land under the oral sale. If he entered as Taylor's tenant, his possession could not have become adverse until he notified Taylor, his administrator, or his

heirs, that he claimed adversely, and there is not the slightest evidence that any such notice was ever given. In other words, the original entry must have been under an adverse claim of title; or, if permissive, then claim of adverse title must have been asserted by Flanagan and brought home to the true owners. This important distinction, we repeat, the charge of the judge utterly ignored.

The only proper instruction which the judge could have given to the jury, under the evidence in the case, would have been to have specifically submitted to them the question whether they believed Flanagan's story of the oral sale; for if not true, then Flanagan's possession during Taylor's lifetime must have been only permissive, and not adverse. We claim that this story is so vague, contradictory and improbable, and so overwhelmingly contradicted by trustworthy and disinterested witnesses and all the facts and surrounding circumstances of the case, that under the rule of the Federal courts a verdict finding its truth could not be sustained, and therefore should not have been even hypothetically submitted to the jury. Unless Flanagan's story as to his oral purchase from Taylor is true, there is not the slightest evidence that his possession was originally ad-

verse, or ever became so by any notice to the true owners of his claim.

The charge of the judge substantially was to the effect that Flanagan's rights were the same whether he originally entered on the land as purchaser or as tenant. The authorities to which we now call the court's attention show this view of the case to be erroneous.

Where the entry upon land is permissive, the statute of limitations will not begin to run against the legal owner until an adverse holding is declared, and notice of such change is brought to the knowledge of the holder of the legal title.

Collins v. Johnson, 57 Ala. 304.
Alexander v. Wheeler, 69 Ala. 332.
Hudson v. Putney, 14 W. Va. 461.
Foulke v. Bond, 41 N. J. 527.
Zeller's Lessee v. Eckert, 4 How. 290.
Kirk v. Smith, 9 Wheat. 241, 288.

In the case of *Zeller's Lessee v. Eckert*, *supra*, Mr. Justice NELSON, speaking for this court, *inter alia*, said:

"The statute, therefore, does not begin to operate until the possession, before consistent with the title and rights of the owner, becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious, so as to preclude all doubt as to the charac-

ter of the holding or the want of knowledge on the part of the owner. If he then neglects to enforce his rights by action within the period fixed by the statute, the loss, as is in every other case of the kind, is attributable to his own laches and not to the law."

In *Kirk v. Smith*, *supra*, Chief Justice MARSHALL said:

"One of these, which has been recognized in the courts of England and in all others where the rules established in those courts have been adopted, is that possession, to give title, must be adversary. The word is not, indeed, to be found in the statutes, but the plainest dictates of common justice requires that it should be implied. It would shock that sense of right, which must be felt equally by legislators and judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title."

In *Collins v. Johnson*, *supra*, BRICKELL, C. J., speaking for the Supreme Court of Alabama, said:

"If the possession of the appellee was merely permissive in its inception; if as a mere matter of favor because of his relationship to the appellant, he was permitted to remain in possession of the lands, the possession could become adverse only by a clear, positive, continuous disclaimer and disavowal of the appellant's title, and the assertion of a title hostile to him brought to his knowledge. From the time of such disclaimer of the appellant's title, and the assertion of a hostile title, the possession would become adverse, and if con-

tinuous and uninterrupted for the period prescribed to bar an entry into lands, the appellant cannot recover without such disclaimer and assertion of hostile title, the length of time during which the appellee may have been in possession is immaterial and does not affect appellant's right of recovery."

Mr. Wood, in his work on Landlord and Tenant, at Section 1, defines a tenant in this language:

"*A tenant is one who occupies the lands or premises of another in subordination to that other's title and with his assent, express or implied.*"

It is not necessary that money be paid.

It is well settled law that where the relation of landlord and tenant has been created, the possession of the tenant is consistent with the title of the landlord, and to initiate an adverse holding, the tenant must surrender the possession to the landlord or do something equivalent to that and bring home to him knowledge of the adverse claim.

Willison v. Watkins, 3 Pet. 43.
Whiting v. Edmunds, 94 N. Y. 309.
Towne v. Butterfield, 97 Mass. 105.
Tilghman v. Little, 13 Ill. 241.
Estes v. Long, 71 Mo. 605.
Reed v. Shetley, 6 Vt. 602.

In Tyler on Ejectment, at pp. 872 and 877, the learned author says:

"In all cases where a party is in possession of land in privity with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under the title and assertion of title in himself brought home to the owner will satisfy the law. * * * When a fiduciary relation exists between the possessor and the owner, a clear, positive and continued disclaimer and disavowal of the title and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the statute of limitations. Otherwise the grossest injustice might be practiced; for without such notice the owner of the land might well rely upon the fiduciary relations to which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations."

It must be made plain that the real owner has been given a cause of action, and if the possession be commenced in subordination to his right, there should be evidence of distinct renunciation of it before he is put in position to lose anything by not bringing suit. If one goes into possession under him, he is entitled to assume that his rights are continuously admitted until the contrary is brought to his knowledge.

Willison v. Watkins, 3 Pet. 43.
Farrow v. Edmundson, 4 B. Mon. 606.
Sherman v. Transportation Company, 31 Vt. 162.
Campeau v. Lafferty, 50 Mich. 414.

This court has, in *Zeller v. Eckert*, 4 How. 290, stated the rule clearly and distinctly. The court, after stating that a trustee may disavow and disclaim his trust; a tenant, the title of his landlord after expiration of his lease; a vendee, the title of his vendor after breach of the contract, etc., said:

"The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced, is in the degree of proof required to establish the adverse character of the possession. As that was originally taken and held in subserviency to the title of the real owner, a clear, positive and continued disavowal of the title and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute."

The evidence that Flanagan originally entered upon the forty acre tract of land as tenant of Taylor was overwhelming. In the first place, the positive testimony of Edward A. Taylor and Ella Arnold, son and daughter of E. B. Taylor, deceased, was to the effect that their father gave Flanagan leave to stay upon the land in dispute until such time as he, E. B. Taylor, or some of his family wanted it. In response to the question, "Did John Flanagan ever call at your house in Omaha to talk with you in reference to these twenty acres?"

Edward A. Taylor answered, "Yes, sir, he did." "What did he want of you in reference to it?" Ans.: "He told me that he had been to see you," (meaning Mr. Estabrook, plaintiff's counsel, who was interrogating the witness) "and that you found that I had an interest there. He wanted to know if I cared whether he stayed on the land or not, and I told him, 'No, I did not.' He said my father told him he could stay there as long as he wanted—as he didn't want it." "Did you have more than one interview with him?" Ans.: "After that, I had several." "At the first, state whether Flanagan ever made any claim of ownership or of your father having given, sold or conveyed that property to him." Ans.: "No, sir; he didn't any further than he stated that father told him he could stay there until such time as he wanted it, or some of us put him off." "Did you ever have, subsequently to that, an interview with John Flanagan, in the office and in the presence of David Van Etten, in reference to this property?" Ans.: "It was after that." "What was that about? What did they want?" Ans.: "He wanted me to quit-claim my interest to him." "Did he make any proposition as to what he would do?" Ans.: "After his death it was to revert to me and my sister, if I did this." In response to the question, "Do you know how Flanagan came to be put

into possession of the land in controversy in this suit?" Ella Arnold, daughter of E. B. Taylor, deceased, answered: "I don't know that my father ever placed John Flanagan in possession absolutely, of the forty-acre tract near the barracks or any part thereof, but that he (father) gave him (Flanagan) permission to use the land in question for agricultural purposes; that is, allowed him to farm the land in question until such time as my father or the family, in case of father's death, saw proper to sell or occupy the same." "Did you at any time ever hear any conversation between your father and John Flanagan, in which your father agreed to give, sell or convey said property or any part thereof to John Flanagan?" Ans.: "I did not at any time ever hear of father selling, giving or agreeing to convey said land or any part thereof to said Flanagan."

Jacob Elton, an immediate neighbor of Flanagan for fifteen years prior to the commencement of this suit, testified that Flanagan made no claim whatever to the land in question until about 1883, and that then he simply claimed that E. B. Taylor, deceased, told him that he could have the use of the same as long as he lived. Rec. p. 126.

Henry Mack, the negro man who helped Flanagan build his house on the twenty acres in dispute in 1874, testified that Flanagan said

at that time that he was "going to jump it." This was after E. B. Taylor's death.

Reuben and Charley Elton, L. E. and John Simpson, all of whom were immediate neighbors of Flanagan for years and saw both him and the land in question almost daily, testified that Flanagan made no claim whatever to the land in controversy.

E. A. McClure, administrator of the estate of E. B. Taylor, deceased, testified that Flanagan actually paid him five dollars rent for the use of the land in 1873 or 1874, and promised to pay rent as long as he was able.

Housel and Allen, agents of plaintiff, testified that Flanagan made no claim of ownership of the land in suit at the time they demanded possession thereof in 1878 in the name of plaintiff, who had become the owner by purchase at sheriff's sale in 1876. On the contrary Flanagan agreed to rent the land from them and the evidence shows that Julia Flanagan, his wife, actually took a lease from them, as agents of plaintiff, and gave her promissory note for sixty dollars, secured by chattel mortgage, for the payment of one year's rent. The lease, the note and the chattel mortgage are in evidence. Rec. pp. 100-102. Housel and Allen testified that Flanagan actually paid rent while in possession under the lease of

1878, and that when the lease with Flanagan expired in 1879 Mr. Allen rented the land in dispute to Jacob Elton for one year for sixty dollars. This lease was in writing and is in evidence. Rec. p. 123. The evidence of both Allen and Elton shows that Elton, upon the expiration of his written lease, rented the land in controversy from year to year and farmed the same for five years from 1879, paying the rent therefor regularly to Mr. Allen, plaintiff's agent. That Elton occupied and cultivated the land in dispute from 1879 to 1884 as plaintiff's tenant and paid rent therefor is uncontroverted. The positive evidence of these disinterested witnesses makes it clear, it seems to us, that Flanagan first entered upon the "forty-acre tract" of land as tenant of E. B. Taylor, deceased, and remained in possession thereof as tenant by the permission and indulgence of the true owners.

E. B. Taylor, deceased, regarded and treated the "forty-acre tract" of land as his own down to the time of his death, for in 1870 he sold one-half thereof to J. E. Boyd for $6,000 and mortgaged the other half thereof to plaintiff in 1871 to secure the payment of his notes amounting to $6,000. Edward A. Taylor regarded the land in suit as belonging to him after his father's death, for he gave Flanagan permission to occupy the same.

E. A. McClure, administrator, collected rent of Flanagan and always supposed the land belonged to the estate of E. B. Taylor, deceased. The plaintiff certainly dealt with the land, after he foreclosed his mortgage thereon, as an owner would deal with his property. In 1878 his agents, Housel & Allen, leased it to Julia Flanagan, and in 1879 rented the same to Jacob Elton and Elton farmed it for five years as plaintiff's tenant, sub-letting a part thereof to Flanagan. If Flanagan was in possession of the land in suit under a claim of ownership, the true owners certainly didn't know it. E. B. Taylor, deceased, didn't know it, for in 1870 he sold one-half thereof to James E. Boyd and mortgaged the other half thereof in 1871 to plaintiff. Plaintiff didn't know it, for in 1878 he rented the same to Flanagan's wife and in 1879 leased the same to Jacob Elton. The true owners knew that Flanagan was at times on the land in suit, but the evidence most strongly proves that they only knew he was there as their tenant and not as an adverse claimant. There was no evidence that Flanagan ever notified any of the true owners that he was occupying the land in question as an adverse claimant.

The only evidence tending to prove that Flanagan entered the "forty-acre tract" of land

under a claim of ownership was that of Flanagan himself. His story, as told at the trial of this case, was that E. B. Taylor, deceased, gave him the forty-acre tract in satisfaction of a claim of one hundred and seventy-five dollars, which he had against him for work and labor done and performed, and that he entered upon the same about the year 1868, under this arrangement. He does not pretend to say that Taylor gave him any deed or promised him any. Flanagan is the only witness who testified to this parol sale actually being made. His evidence on this point, uncorroborated as it is, and told for the first time twenty years after the pretended parol sale is claimed to have been made, after the lips of E. B. Taylor, deceased, had been silenced by death, after the land in suit had become very valuable, and after he had given defendant a warranty deed thereto, is entitled to little, if any consideration. The fact that Taylor the other party to this alleged parol sale, was unable to speak at the trial of this case by reason of death, without more, is enough to stamp this story with suspicion and to require clear corroboration. It is the statute law of most of the States of the American Union, that where the lips of one party to a contract are closed by death, the other party cannot be heard as a witness. The reason of the rule is, that where there is no mutuality

there can be no admissibility. The courts have united in effectuating it so far as to silence one party as a witness as to mutual dealings concerning which the other party is unable to speak. The purpose of the statutes is to provide that when one of the parties to a litigated obligation is silenced by death, the other shall be silenced by law. Of the evidence of this class it has been remarked by JAMES, L. J., "even if legally admissible for any purpose, the interests of mankind imperatively require that unless corroborated it should be wholly disregarded." See Wharton on Evidence, Secs. 466 and 467. While Flanagan's testimony as to this alleged parol sale may be admissible under the law governing the Federal Courts, there is just as much reason as ever why such testimony should be received with suspicion.

There is no evidence in this case tending to corroborate his story. On the contrary, every fact and circumstance points to the falsity thereof. The undisputed facts alone of this case show beyond question that his story of a parol sale can't be true. E. B. Taylor, deceased, at the time of this pretended parol sale and subsequent thereto, was a prominent citizen of the city of Omaha, and a man of family; he was the editor and publisher of a leading paper there. Is it reasonable to suppose that he,

under such circumstances, would give away a "forty-acre tract" of land in 1868, 1869, 1870, 1871 or 1872, for which he had paid four hundred and fifty dollars in 1862, to satisfy a small claim of one hundred and seventy-five dollars for menial services rendered? The undisputed evidence further shows that Taylor sold one-half of the "forty-acre tract" in 1870, for six thousand dollars, to Jas. E. Boyd, and gave him a warranty deed thereto; and in 1871 mortgaged the other half thereof to plaintiff to secure the payment of $6,000. It will be observed that Taylor sold one-half of the forty-acre tract for six thousand dollars somewhere near the time of the alleged parol sale of the forty-acre tract to Flanagan for one hundred and seventy-five dollars—a most remarkable rise in the value of real estate. The undisputed evidence further shows that plaintiff foreclosed his mortgage and became the owner of the land in suit in 1876, and that he leased the same to Julia Flanagan in 1878, and in 1879 rented the same to Jacob Elton, who took possession thereof and cultivated the same for five years, paying the stipulated rent therefor regularly to plaintiff's agent. Flanagan's story of a parol sale in the face of all these facts and circumstances is not only false, but absurd. Think of E. B. Taylor, deceased, a business man,

paying four hundred and fifty dollars for a tract of land in 1862, and giving the same away eight or ten years thereafter in satisfaction of a claim of one hundred and seventy-five dollars for menial services rendered! Think of his giving away land for one hundred and seventy-five dollars, half of which he was able to sell about that time for six thousand dollars! Think of him selling and mortgaging land which he did not own, thus subjecting himself to criminal process! A more absurd story than that of Flanagan could not well be imagined. The truth is that E. B. Taylor, deceased, owned the forty-acre tract of land, and Flanagan's entry thereon from time to time was as tenant, and not as an adverse claimant.

The parts of the charge of the court covered by our first three exceptions are also erroneous in that they do not define at all, certainly not correctly, the elements of adverse possession.

The law as applied to this case, as we have seen from a review of authorities, is:

First. In order to sustain defendant's title by adverse possession, there must be clear, satisfactory and convincing evidence that Flanagan's original entry upon the land was under claim of adverse title; or, if permissive, that he subsequently asserted a claim of adverse title, and

brought notice of that claim home to the true owners.

Second. That after his possession became adverse it must have continued adverse for the period required by the Statute of Limitations.

Third. The possession must have been actual, continuous, open, notorious and exclusive during the entire period.

In the judge's charge given on his own motion to the jury he omitted substantially all of these elements, and said in effect that if Flanagan went into possession of the land under an arrangement with Taylor, without saying what the arrangement was, and continued for ten years, he acquired title. Flanagan had *no color of title*, and therefore, before the defense of adverse possession could be sustained, not only must clear and satisfactory evidence have been introduced, but the instructions of the court should have clearly and intelligently defined to the jury all of the elements necessary to make title by adverse possession.

We further submit that that part of the charge covered by our third exception, which states that it was not necessary for Flanagan to have gone on the premises and lived there, is erroneous in that under the facts of this case the only kind of possession

which Flanagan had, a great part of the time, was living upon the land. That part of the charge also assumes that if he fenced it he acquired some rights, while the testimony, including his own, shows that he never did fence it. From the very nature of this land Flanagan could not have had such possession as the law requires unless he lived upon it and cultivated it. Neither he nor his wife nor any witnesses in the case pretend that he ever cultivated the land during the years when he did not live upon it. He therefore had no actual possession of the land except during the years that he actually lived there and cultivated it. It is a familiar rule that the instructions of the court must be confined to the evidence in the case.

Our fourth exception to the charge is to the concluding part thereof in which the judge attempted to direct the jury as to their special verdict. He did not require them to find that Flanagan entered the land under *adverse* claim of title. He did not require them to find that the possession was *actual, open, notorious and exclusive.* He did not require them to find that if Flanagan did not originally enter under claim of adverse title and that he subsequently made such claim of adverse title, that such claim must have been brought home to the knowledge of the true owners. All he required them to find was that Flanagan went into

possession, and whether his possession was adverse, continuous and hostile *prior to the commencement of this suit.* It is not surprising, therefore, that when the jury rendered the special verdict, they did not find the facts constituting the necessary elements of adverse possession, as we have shown in discussing their special verdict.

VIII.

The Charge, taken as a whole, was misleading.

The charge given the jury in this case by the trial judge on his own motion, the principal part of which followed the giving of instructions at plaintiff's request, from beginning to end was loose, inaccurate and directly in conflict with the principles of law announced in plaintiff's instructions, and the charge in its entirety was therefore necessarily misleading to the jury. Just before giving plaintiff's instructions, the judge made the following statement to the jury:

"The plaintiff has asked me to give you several written instructions. Most of them are correct and I will give them without qualification or amendment. * * * As I said, all of the instructions asked for the plaintiff relate mainly to the possession of Flanagan, under which the title for the defendant is claimed, and that will virtually dispose of the whole controversy, as I think. I am not prepared to say that I ought

to go to the extent of justifying and sustaining all that is stated in the written instructions asked for."

This statement probably accounts for the conflict between plaintiff's instructions and that portion of the charge given by the judge on his own motion. And it is not surprising that the charge, taken as a whole, should have been conflicting when it is understood that plaintiff's instructions, though given by the judge, did not fully meet with his approval.

The instructions given at plaintiff's request correctly stated the principles of law involved in and applicable to the case at bar, but the trial judge, in charging the jury on his own motion in addition thereto, took an entirely different view of the case. Plaintiff's instructions stated that to defeat the rightful owner's title to land by adverse possession thereof, there must be an entry upon the same under a claim of title or ownership thereto and actual, open and notorious, hostile, exclusive and continuous possession thereof for the statutory period of limitation, and that all of these elements were absolutely essential, and further, that if Flanagan first took possession of the land in dispute by the permission of Taylor, his possession thereof could not be considered adverse until a distinct disclaimer of holding

possession by such permission was brought to the notice and knowledge of Taylor or his representatives, thus pointing out to the jury the necessity of notice to the true owner of the assertion of an adverse claim or right to his title in addition to the other elements of adverse possession, where the possession in its inception is subservient to the title of the real owner.

The idea of the trial judge, as indicated by the first part of his charge to the jury, seems to have been that if Taylor made a parol sale of the "forty-acre tract" to Flanagan, then the defendant was entitled to a verdict, for he charged the jury at the very outset that plaintiff had made out a good and perfect title to the land in controversy, and was entitled to recover unless the defendant could "show a superior title derived from or through one of the plaintiff's grantors." In other words, the judge's idea seems to have been that if Flanagan became the owner of the equitable title to the "forty-acre tract" by reason of a parol sale thereof to him by Taylor, and defendant acquired title from Flanagan, plaintiff could not recover. An equitable ownership of the land in dispute was not pleaded by defendant in his answer and couldn't have been, as equitable defenses are not permissible in actions at law in the Federal courts. The question of a parol

sale of the land in controversy was, therefore, not in issue under the pleadings, and whether there was in fact a parol sale was only material as evidence that Flanagan's original entry upon the forty-acre tract was under a claim of ownership thereto. If defendant had proved by undisputed evidence that Taylor had made a parol sale of the land in controversy to Flanagan, the plaintiff would still have been entitled to recover the possession thereof in the absence of further proof on the part of the defendant that Flanagan subsequently entered thereon under a claim of ownership thereto and continued in the actual, open and notorious, exclusive and adverse possession for ten years. The view of the trial judge that, if Taylor made a parol sale of the land in suit to Flanagan without proof of an adverse possession thereof for ten years, the defendant was entitled to a verdict was, therefore, wholly erroneous, in conflict with the principles of law stated in plaintiff's instructions, and therefore misleading to the jury.

Just after giving plaintiff's instructions, the trial judge proceeded to charge the jury on his own motion, and in doing so prefaced the same by making the following observation:

"I believe that disposes of the written instruction on that point, and as they are not as

full as they ought to be, I propose to go outside of what is there stated and give one on my own motion."

This observation of the trial judge will account for that portion of the charge following immediately thereafter conflicting with plaintiff's instructions; for, it will be observed, the judge told the jury that he proposed to *go outside of what was stated in plaintiff's instructions* and give one on his own motion. And in going outside thereof he, in effect, charged the jury that if Flanagan entered into possession of the land in suit, whether as tenant of Taylor or as an adverse claimant, and remained in possession thereof for ten years, the defendant was entitled to judgment. The element of notice to the true owner of the assertion of an adverse claim to his title in case of possession of land which, in its inception, was permissive and subservient to the title of the rightful owner was completely overlooked, no reference whatever being made thereto in the charge. The evidence, we have already seen, was conflicting as to the arrangement or agreement under which Flanagan first took possession of the land in suit, that of plaintiff proving beyond doubt that he entered thereon by the permission of Taylor, and claimed the same in subserviency to the title of the true owners, while that of defendants tended to prove that he entered

under a claim of ownership thereto. Under this state of facts, that the jury might arrive at a just verdict, it was not only highly important, but absolutely necessary, that the jury should have been fully charged as to the elements of adverse possession, both where the possession in its inception is adverse to the title of the true owner, and where in its inception it is permissive and in subordination thereto. The charge given by the judge on his own motion applied alike to a possession begun in hostility to the true owner and to one begun in privity with the rightful owner, no distinction whatever being made. That no such distinction was recognized by the trial judge in said charge is made clear by the following portions thereof:

"The plaintiff need not show defects, because the defendant himself must establish the fact that he is the owner of the legal title to the premises in dispute before he can defeat the plaintiff's right to recover, and the plaintiff having established his right and shown his title, making what we call a *prima facie* case, and it only appearing from the papers that have been introduced in evidence that his title was good, unless the defendant satisfies you by a preponderance of proof that Flanagan claimed under Taylor and went into possession and remained in possession for a period of ten years, then the plaintiff is entitled to recover. * * * "

"Where a party claims title by virtue of his own possession for a period of ten years, and

where he claims his title by virtue of an arrangement stated to have been made with or through the owner, a verbal one, and the party went on the premises and took possession of the same in consequence of making that agreement and continues in possession for the space of ten years, it makes his title good as against all the world unless there is something done or said by himself that would affect his own right. * * *

"If you find from the testimony that the plaintiff is entitled to recover the premises in dispute, your verdict ought to be, 'We, the jury, find that at the time of the commencement of this suit the plaintiff was the owner of the premises in dispute and entitled to the immediate possession thereof.' But if you take the other view and find that the defendant has a good title and that he is entitled to recover, then I think you ought to go further and find the fact that he entered into the possession of the premises at a certain time, or as near as you can fix it from the testimony; that he occupied the premises; that he continued in possession for more than ten years prior to the commencement of this suit, which was Dec. 4, 1886. You ought to find, if you can from the testimony, about the time that he went into possession, whether he continued in possession, and whether his possession was adverse, continuous and hostile prior to the commencement of this suit, or whether Flanagan and his grantees, defendants in this suit, continued in possession that long, because if Flanagan himself and his representative continued in possession that long, it is the same as if Flanagan was in possession that long himself."

"If you find for the defendant, find when he took possession if you can, and as near

as you can how long he remained in possession before the commencement of this suit. Then your verdict will be, in addition to that: 'We therefore find that at the commencement of this suit, the defendant was the owner and entitled to the immediate possession of the premises in dispute.' That disposes of the whole controversy so far as the verdict of the jury is concerned."

The sum and substance of the charge taken as a whole, and especially that portion thereof given by the judge on his own motion applying the law to the evidence, was that if Flanagan entered upon the land in suit, and he and the defendant remain in possession thereof ten years, the defendant was entitled to a verdict. That this view of the case, when considered in the light of the foregoing authorities, was wholly erroneous and misleading to the jury, we think there cannot be the slightest doubt.

The rule of law is well settled that conflicting instructions are ground for reversal. The reason of the rule is that such instructions furnish no guide to the jury. Such instructions tend to confuse the jury instead of aiding them as they should in coming to correct conclusions.

Stevenson v. Hancock, 72 Mo. 612.

Bludorn v. R. R. Co., 108 Mo. 439, 450.

The instructions given at plaintiff's request,

and those given by the trial judge on his own motion over the objection of plaintiff, we have just seen, were conflicting and misleading. This error alone ought to work a reversal of the judgment rendered in this case.

Conflicting instructions are necessarily confusing and misleading to the jury.

In *Washington & G. R. R. Co. v. Varnell*, 98 U. S. 233, it was held that where the charge of the judge is of a character to mislead the jury, the error is one of law and may be corrected in the Appellate Court.

The evidence, we have seen, showed that for three or four years after Flanagan's entry upon the land in controversy, and while he lived in the Briggs house near the barracks and on the Denise farm, which we have also seen was some time between the years 1868 and 1875, he did nothing more thereon than simply cut hay. The only witness who undertook to say that Flanagan lived on the land during the years 1869, 1870, 1871, 1872 and 1873, was C. A. Baldwin. This witness, however, when pressed for the truth on cross-examination, said that he thought that Flanagan lived on the land during the years 1871, 1872, 1873 and 1874, and that that was as positive as he would make it. We submit, therefore, that the evidence of both defendant and plaint-

iff showed that for three or four years, from 1868 to 1875, Flanagan did not live on the land in suit, and that during those years he simply cut hay thereon; for the rule is, that adverse possession can only be made out by clear, positive and strict proof. Such acts as cutting hay, it has been shown under Division VI. of our Brief, do not constitute adverse possession. Flanagan's possession during those three or four years was therefore not actual, open and notorious and exclusive. The running of the statute of limitations in his favor, if it ever began, was therefore suspended.

The undisputed evidence proved that from 1879 to 1885 Jacob Elton was in possession of the land in dispute, farming it as plaintiff's tenant. Admitting the truth of Flanagan's statement that during the years from 1879 to 1885 he claimed the land in question as his own, his possession was not exclusive; for the law is well settled that where the possession is mixed, the legal seisin is according to the legal title.

In *Deputron v. Young*, 134 U. S. 255, this court, speaking through FULLER, C. J., said:

"Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seizin is according to the legal

title, so that in the case at bar there could be no constructive possession on the part of the defendant or his grantors. Even that might exist if he had had actual possession of a part, and no one had been in possession of the remainder."

See also

Hunnicutt v. Peyton, 102 U. S. 333, 368.

Barr v. Gratz, 4 Wheat. 213, 233.

The possession of the land being in the plaintiff from 1879 to 1885, Flanagan's possession was therefore not exclusive during those years, and the running of the statutes of limitations was interrupted.

There was therefore no such evidence as the law requires in a case like the one at bar, proving that Flanagan, or Flanagan and defendant, had been in the actual, open and notorious, adverse, continuous and exclusive possession of the land in question under a claim of ownership thereto for ten years, the statutory period of limitation in the State of Nebraska.

The rule as laid down by this court is, that in *all cases* there must be more than a scintilla of evidence in support of a claim to justify the trial judge in submitting the case to the jury: there must be such evidence that the jury can properly find a verdict for the party producing it.

U. S. v. Breitling, 20 How. 252.

Improvement & R. R. Co. v. Munson, 14 Wal. 442.

Pleasants v. Fant, 22 Wal. 116.

Anderson County Commissioners v. Beal, 113 U. S. 227.

In *Improvement & Railroad Company v. Munson*, *supra*, Mr. Justice CLIFFORD, speaking for this court, said:

"Formerly it was held that if there was what is called a scintilla of evidence in support of a claim the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule: that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

In *Pleasants v. Fant*, *supra*, where one of the questions was whether there was sufficient evidence thereof to submit the case to the jury, Mr. Justice MILLER, speaking for this court, said:

"But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstance should have been submitted to them, with such declarations of what constitutes a partnership as would enable them to decide carefully.

"No doubt there are decisions to be found

which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case, it must be submitted to the jury, and in the present case if the court had so submitted it with proper instructions, it would be difficult to say that it would have been an error.

"But as was said by this court in the case of the *Improvement Company v. Munson*, 24 Wallace 448, the recent decisions of high authority have established a more reasonable rule, that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

There is no better settled principle of law than that there must be some evidence on which a charge to the jury is founded; otherwise it cannot be lawfully given.

The U. S. v. Breitling, 20 How. 252.

In that case, TANEY, C. J., said:

"It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the testimony."

In *Jones v. Randolph*, 104 U. S. 108, a charge was held misleading which assumed that full payment of the debt had been made when there was no evidence to support such a verdict and the judgment was reversed for that reason.

The charge by the trial judge on his own motion over plaintiff's objection assumed that there was clear and positive evidence proving title by adverse possession in Flanagan and defendant. If we are right in our contention that there was no such evidence, it follows that the charge given by the trial judge on his own motion and excepted to by plaintiff at the time was erroneous.

The true rule of appellate precedure is that error is presumptively prejudicial and must cause a reversal unless the record shows beyond a doubt that there could have been no prejudice.

Deery v. Dray, 5 Wal. 807.

The errors here complained of must therefore be presumed to have been prejudicial, and if this court cannot see beyond doubt that they were not, the judgment rendered in this case for defendant will have to be reversed.

Respectfully submitted.

JAMES HAGERMAN,
HUGH C. WARD,
Attorneys for Plaintiff in Error.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1893.

No. 110.

SETH E. WARD,
Plaintiff in Error,

vs.

ELMER G. COCHRAN,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

JOHN M. THURSTON,
W. J. CONNELL,
Attorneys for Defendant in Error.

OMAHA PRINTING COMPANY.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

I.

The attention of the Court is called to the fact that no assignment of errors was filed in the Court below, or annexed to and returned with the writ of error in this case, as required by Section 997 of the Revised Statutes, nor does any such assignment of errors appear in the record herein; whereby the plaintiff in error has wholly failed to comply with Section 4 of Rule 21 of this Court. We therefore move the Court to enforce the 5th section of Rule 21.

Benites v. Hampton, 123 U. S., 519.

II.

This case was tried before a jury in the court below and a verdict rendered on the 9th day of December, 1887 (Record p. 7). Thereafter a motion for a new trial was held under advisement until the 5th day of December, 1889, of the November term of said court, when judgment was entered upon the verdict. It therefore appears that no bill of exceptions was prepared or presented at the trial term, and no order was asked with respect thereto by the plaintiff in error until the 26th day of December, 1889, just prior to the end of the November term, when the court entered an order without the consent of the defendant in error, giving the plaintiff until the first day of February, 1890, in which to present a bill of exceptions (Record p. 10); a time beyond the said November term, at which the judgment was entered.

We submit that it was not within the power of the court to make such an order; that the same was made without any notice to the defendant; and the bill of exceptions not having been signed and allowed at either the trial or the judgment term—and having in fact been signed and allowed on the first day of March, 1890 (Record, p. 167), a date long subsequent to the suing out of the writ of error and the service of the citation in the case—the said bill of exceptions was not in time to preserve of record the alleged errors complained of.

We refer to the case of *Muller et al. v. Ehlers*, 91 U. S., 249.

III.

We insist that the so-called bill of exceptions in this case should not be considered by the Court because the same has been prepared in utter disregard of the rules of this Court concerning the forms of bills of exceptions.

It purports to contain all of the evidence, and is simply a transcript of the entire testimony occupying more than 160 pages of the printed record. If the Court sees fit to carefully examine this mass of evidence, it will be discovered that no more than four or five objections and exceptions were taken to the introduction of testimony by the plaintiff in error throughout the whole trial, and all of those were of the most trivial and inconsequential character; and there is no exception either to testimony admitted or rejected, or to the charge of the Court, which requires the setting forth of any of the testimony taken at the trial. As long ago as December, 1869, this Court in the case of *Hickman v. Jones*, 9 Wall., 197, felt called upon to say:

"We have to complain in this case, as we do frequently, of the manner in which the bill of exceptions has been prepared. It contains all the evidence adduced on both sides and the entire charge

of the Court. This is a direct violation of the rule of this Court upon the subject."

It would seem as if the foregoing, together with the standing rule of this Court, might have been taken by the profession as a timely warning, but it is our understanding that violations of the rules of the Court concerning statements to be contained in bills of exceptions still occur from time to time.

We think the case at bar is very similar to the case of *Hanna v. Maas*, 122 U. S., 24. The bill of exceptions in that case was the same as in this, except that the transcript of the testimony and the charge of the Court were called "Exhibit A." The Court will note that the so-called proposed bill of exceptions submitted to the trial judge was in fact a transcript as taken by the stenographer. See the heading thereto (Record, p. 15), and the stenographer's certificate at the end thereof (Record, p. 197).

We do not conceive that it is any part of our duty to counsel or advise the Court as to what action should be taken in a case of this kind where the rules of the Court have been openly and knowingly violated. The utter disregard of the rules and wishes of this Court by the attorneys of the plaintiff in error was wantonly persisted in after their attention had been called thereto by the written protest of the defendant's attorneys, objecting to the so-called bill of exceptions as prepared, on the

express ground that the same set forth the entire evidence in the case in direct violation of the rules of this Court (Record p. 198). We are not so solicitous as to whether or not the Court in the case at bar shall permit the bill of exceptions to stand, as we are to have a final determination to govern us in the preparation of bills of exception hereafter. We presumably represent hundreds of attorneys who would most gladly avoid the labor and responsibility of preparing bills of exceptions in accordance with the rules of this Court, if the Court is disposed to accept the burden of examining a voluminous transcript of testimony for the discovery of alleged errors therein. It would seem as if the failure of the plaintiff in error to file or have returned with the writ of error any assignment of errors, and his negligence in the matter of securing an allowance of a bill of exceptions, and his violation of the rule of this Court by substituting the transcript of testimony in lieu of a bill of exceptions, would justify the Court in summarily dismissing the case.

IV.

This was a case of ejectment for the recovery of real estate. The plaintiff proved a complete chain of title through one E. B. Taylor. The defendant claimed title and right of possession through color of title derived from the same E. B. Taylor, which

had ripened into a perfect title by adverse possession for a period of more than ten years. The decisions of the Supreme Court of Nebraska relating to adverse possession will be hereinafter referred to and as far as necessary cited. The only question in the case, therefore, was as to the character, duration and continuity of the defendant's possession. This was a question of fact for the jury, and the jury specially found as follows (Record, p. 7):

"We, the jury empaneled and sworn to try the issues joined in the above-entitled cause, do find and say that one John Flanigan, in the year 1868, entered into the possession of the west one-half of the northeast quarter of the southwest quarter of section 4, in township 15 north, of range 13th east, of the 6th principal meridian, in Douglas county, Nebraska, being the land in controversy in this case, under a claim of ownership thereto, and that he remained in the open, continued, notorious and adverse possession thereof for the period of sixteen (16) years thereafter and until he sold and transferred the same to the defendant in this case.

"We further find that said John Flanigan and Julia, his wife, by good and lawful deed of conveyance, conveyed said premises to the defendant in this suit in 1885, and surrendered his possession to this defendant, and that said defendant has remained in the open, continuous, notorious and adverse possession of the same under the claim of ownership down to the present time. We therefore find that at the commencement of this suit the defendant was the owner of and entitled to the possession of the said premises, and upon the issues joined in this case we find for said defendant."

We submit that this verdict was a finding of special facts; that this finding has not been set aside, and these facts so specially found justify the judgment in the case, without regard to whether or not the judge may have failed in his charge to the jury to state every abstract proposition of law correctly and fully.

V.

There being no assignment of errors in the record and the brief for plaintiff in error not being on file in time to enable us to examine the same prior to preparation of our own, we certainly grope somewhat in the dark as to what it is necessary for us to meet in the way of argument. Should the Court deem it necessary to examine the evidence in the case at all, it will be found that the testimony of the defendant tended to show that one, John Flannigan, an uneducated colored man, had worked for E. B. Taylor, through whom plaintiff in error claims title, and the said Taylor being unable to pay Flanigan wages due, gave him (as Flanigan testifies) the twenty acres of land in controversy. This was about the year 1868, and at that time the land was of but trifling value. The colored man, Flanigan, knowing no reason why a gift of land by word of mouth was not as good as any other title, entered into possession of the tract, erected his cabin thereon and with his

wife continued to reside there (as the jury has found) for a period of sixteen years. The evidence further tended to show that during all this time he claimed to own the property, erected fences around it and cultivated it. There was a conflict of testimony as to whether or not his possession had been continuous. There was evidence tending to show that at one time he had been tricked by the superior shrewdness of a white man into acknowledging a superior title, and it was claimed that his wife had accepted a lease in her own name from the party claiming to be the owner.

As to all these questions, however, there was a decided conflict of testimony which could not be reconciled without discrediting some of the statements of some of the witnesses. There was no dispute as to the character of the color of title which Flanigan asserted when he first entered into possession of the land, nor was there any question that for the greater part of the period of sixteen years he remained in the open, notorious, exclusive and adverse possession of the tract.

There was nothing in the character of the issue or the testimony presented to mislead or confuse the jury. It was almost entirely a question as to which witnesses were to be believed.

On the single issue thus joined the jury found in favor of the defendant.

We understand it to be the settled rule that this Court will not review the evidence for the purpose of determining as to whether or not the conclusion reached by the jury was supported by the greater weight of testimony.

VI.

We also understand that this Court will not consider any alleged error of the Court below in overruling the motion for a new trial. No point of law is made in the motion for a new trial, and we present our case in this Court without making any further reference to the motion for a new trial in the court below and take it for granted that error does not lie from the order of the Circuit Court overruling the motion for a new trial.

Mr. Justice Clifford, in delivering the opinion of this Court in the case of *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall., at page 597, says:

"Authorities are numerous that a motion for a new trial in the Federal Courts is a motion addressed to the discretion of the Court, and that the decision of the Court in granting or refusing it is not the proper subject of a Bill of Exceptions. *Henderson v. Moore*, 5 Cran., 11; *Mar. Ins. Co. v. Young*, Id., 187; *McLanahan v. The Universal Ins. Co.*, 1 Pet., 183; *U. S. v. Buford*, 3 Id., 32; *Barr v. Gratz*, 4 Wheat., 213; *Blunt v. Smith*, 7 Id., 248; *Brown v. Clarke*, 4 How., 4.

Indeed, the universal rule of practice is, that matters resting entirely in discretion are not re-examinable in a court of errors, and there can be no departure from that rule in this Court without overruling its settled practice from the organization of the Court to the present time."

VII.

Should the Court see fit to examine the transcript of testimony—called a bill of exceptions—for the purpose of discovering alleged errors with respect to the admission or rejection of evidence, it will be found that the first objection made by the plaintiff below to the introduction of testimony was, as to the right of the witness, John Flanigan, to testify to the parole agreement under which he claimed to have bought the land from Taylor, the grantor of the plaintiff in error. In advance of any suggestion from opposing counsel we know of no reason which can be urged why this testimony was not entirely competent, relevant and material. (Record, page 44.)

The next exception taken by plaintiff in error at the trial appears on page 56 of the Record. The attorney for plaintiff during his cross-examination of the witness, Julia Flanigan, asked her the following question: "Did you agree to pay Mr. Elton any money for staying there on one acre of ground?" It is needless to suggest that the witness Julia Flan-

igan could not bind her husband, John Flanigan, in a matter of this kind and it is difficult to see upon what theory the right to ask such a question could be predicted.

The next objection appears on pages 77 and 78 of the Record. Counsel for plaintiff on cross-examination of the witness, Warren Cochrane, father of the defendant in the case, attempted to show certain overtures on the part of said Cochrane to plaintiff Ward concerning the purchase of the land in controversy. It is needless to suggest that the said Warren Cochrane was not a party to the cause, and the cross-examination insisted upon was as to facts entirely irrelevant and immaterial to the issue.

The question as to whether or not Warren Cochran, father of the defendant in the case, had advanced the money for the purchase of the land in controversy from John Flannigan, had no bearing upon the issue. Indeed, if Warren Cochran had been the defendant of record, no act or admission of his with respect to the title of the land in controversy would have been important or material. Under the decisions herein cited, and the established doctrine of this court, the title of John Flannigan had become absolute by sixteen years continuous adverse possession (as found by the jury) before he conveyed to Elmer G. Cochran, defendant; and it did not and does not matter whether the defendant Cochran remained in posses-

sion of the property after his purchase from Flannigan, and had the defendant himself published to the world a declaration that the plaintiff's title was perfect, it would in no wise have changed the legal status of the case.

On page 82 of the record it appears that the plaintiff offered in evidence certain copies of tax records. The offer was objected to and the objection sustained. The character of these certain copies of tax records is nowhere shown in the record and it is sufficient to say that all the tax receipts showing payment of taxes by plaintiff were received without objection and considered by the jury.

On the trial defendant offered in evidence the record of proceedings in the county court of Douglas County, Nebraska, in a case of forcible entry and detention brought by Seth E. Ward, the plaintiff in the case on trial, vs. John Flannigan, the grantor of defendant Cochran. THE OFFER WAS AS FOLLOWS: (See bottom of page 59 of the record)—

"THE DEFENDANT OFFERS THE RECORD IN EVIDENCE DOWN TO AND INCLUDING THE JUDGMENT OF THE COUNTY COURT IN THAT CASE."

The offer was first made for the purpose of showing John Flannigan's adverse possession at the date of said suit, and also to show an adjudication between complainant Ward and the said John Flannigan on the question of right of possession. Before the

record was read, however, the offer was limited as appears on page 67 of the record.

"The defendant withdraws the part of the offer where it says it is offered for the purpose of showing adjudication."

The Court will notice that the offer was only of that portion of the record down to and including the judgment of the court. Plaintiff in error has either inadvertently or for the purpose of misleading this Court, embodied in his bill of exceptions an "Exhibit A" containing the testimony introduced in the county court, and which was attached to the record. But the Court will notice it was not a part of the record offered or received in evidence and it has no place whatever in the Bill of Exceptions.

The said exhibit A, as a matter of fact, was not offered, nor was it received in evidence, nor was it read to the jury upon the trial, or in any manner referred to. This so clearly appears from the record, if carefully read, that it would not seem as if it were necessary to call the special attention of this court thereto. But we are fearful that this exhitit A containing the testimony, might be misleading upon ordinary examination of the record, and therefore have deemed it wise to make the foregoing references to the record.

We do not see how any objection can lie to this testimony if we keep in view the fact that nothing

except the record was offered or received, and that for only one specific purpose, to-wit:—to show an existing adverse possession in Flannigan at the time the action was brought in forcible entry and detention by Seth E. Ward, plaintiff in this case. It was an issue between the same parties in interest concerning the possession of the same property. It was certainly good for the purpose of showing the admissions of Ward that Flannigan was in possession at the time.

As a matter of fact, the testimony in the case outside of this record shows that Flannigan was in possession of the property at the time, and therefore its admission could in no wise have prejudiced the case.

Should the plaintiff in error undertake to claim in any assignment of error or argument. that exhibit A, commencing on page 63 and ending on page 66 of the record, was offered or introduced or considered at the trial below, we brand such an attempt as an endeavor to mislead this court and induce it to commit an error upon a misunderstanding of the record.

The only other exception to the ruling of the court on admission of testimony was as to the refusal to permit in evidence a deed from the said E. B. Taylor to one Boyd, a stranger to the suit, for the twenty acre tract adjoining the twenty acre tract in

controversy. This offer was made for the purpose of showing that the land described in said deed was sold in the year 1870 for $6,000. We believe it is entirely unnecessary to make any further reference to this ruling.

It will thus be seen that there were no exceptions taken to the rulings of the court during the entire trial except those of the most trivial and immaterial character.

VIII.

We insist that the entire charge of the Court was strongly favorable to the plaintiff in error.

We are not inclined to consider separately and of themselves those isolated portions of the charge excepted to by the plaintiff. We ask the Court to carefully read all the instructions given. Those numbered from 1 to 11, inclusive, were prepared by plaintiff's counsel and were given without amendment or qualification. They clearly and fully advised the jury of every possible element necessary to constitute such an adverse possession as would ripen into a title if continued for a period of ten years. There is nothing in those particular portions of the charge excepted to which in any manner detract from or limit the full force and effect of the general instructions given by the Court below.

We submit that a careful reading of the entire charge will impress the judicial mind with the fact that the defendant below, if any one, had good cause for complaint because of the character of the instructions. We confess that had the verdict of the jury been otherwise, we would have seriously insisted that the instructions given must have prejudiced the defendant. Fortunately it happened that the case of the defendant, as made by the testimony, was of a character to stand every test of even the most extreme requirements of law, and a jury of white men meted out impartial justice to the poor colored man, John Flannigan.

IX.

THE DECISIONS OF THE SUPREME COURT OF A STATE WITH RESPECT TO TITLE BY ADVERSE POSSESSION, ESTABLISH THE RULE OF PROPERTY WITHIN THE STATE, AND SUCH RULE WILL BE ENFORCED BY THIS COURT.

In the case of *Harpenning et al. v. The Reformed Dutch Church*, 16th Peters, 455, it was held (as per head note):

"The Supreme Court of the United States is bound to conform to the decisions of the State courts in relation to the construction of the statute of limitations of the State in which the controversy has arisen. Such is the settled doctrine of the Supreme Court."

We take it for granted there is no contention on this point.

X.

IN THE ABSENCE OF STATE DECISIONS TO THE CONTRARY, IT IS THE RULE OF THIS COURT, ESTABLISHED BY AN UNBROKEN LINE OF DECISIONS, THAT ADVERSE POSSESSION OF REAL PROPERTY CONTINUED FOR THE STATUTORY PERIOD WITHIN WHICH AN ACTION OF DISPOSSESSION COULD BE COMMENCED, RIPENS INTO A PERFECT AND INDEFEASABE TITLE IN FEE SIMPLE.

In *Harpenning v. Reformed Dutch Church*, last above cited, it was laid down (as per head note) that:

"After the elapse of twenty years from the commencement of adverse possession of the property claimed, the defendants had a title as undoubted as if they had produced a deed in fee simple from the true owners of that date, and all inquiry into their title or its incidents, was effectually cut off."

The rule thus laid down has been followed by this Court in many other cases, but we cite only one, *Bicknell v. Comstock*, 113 U. S., p. 149, in which Mr. Justice Miller delivering the opinion of the Court, says:

"This Court has more than once held that the lapse of time provided by the statutes makes a perfect title.

"In *Leffingwell v. Warren*, 2 Black, 599, it is said that the lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right and vests a perfect title in the adverse holder.

"And this doctrine is repeated in *Croxall v. Sherard*, 5 Wall., 289; and in *Dickerson v. Callgrove*, 100 U. S., 578–583."

XI.

The modern law of an indefeasible estate in fee arising from adverse possession is due to a sort of legal evolution.

The whole doctrine of title by adverse possession was abolished in England. The statute of limitations became the sole reliance of the occupant against the paper title. So completely was the defense of adverse possession abrogated from English law, that Chitty in his work on pleading gave no form of a plea of adverse possession, and accounted for its absence by stating in a foot note that the title by adverse possession had been abolished. But gradually the decisions have repealed the legislation, and title by adverse possession is again firmly re-established, and in no state has this been accomplished with more fullness and certainty than in Nebraska. We have no statute giving title by adverse possession. But our courts have gone to the extent of calling a plea of adverse possession, a plea of the statute of limitations, as in *McKesson v. Hawley*, 22 Neb., 695.

One of the most noticeable consequences attending this evolution is the shifting of the application of the maxim, "Possession follows the ownership."

While the occupant held his land simply by force of the statue of limitations, it applied to the holder of the paper title, and he who had held adversely for fifty years might lose his advantage if at any time within the period named in the statute he abandoned his possession. By virtue of the maxim the holder of the paper title would be in possession at once upon the abandonment. But when the evolution was complete, and an estate was held to become vested by the statute, then the adverse holder might safely abandon his actual possession so soon as it had continued the statutory period, for the benefit of the maxim was then his, and the possession followed him, because he had become the owner.

Perhaps the best description of the modern title by adverse possession is that given by an eastern court in western rhetoric.

"When a man has maintained adverse and hostile possession for twenty-one years he acquires an indefeasible title, as good as any known to the law, though not perhaps as satisfactory or convenient. He need no longer 'put his flag flying.' It has done its work and he may haul it down." *Jones v. Hughes*, (Pa.) 16 At. Rep., 830.

The leading case in the state of Nebraska on the question of title by adverse possession is *Horbach v. Miller*, 4 Neb., 31.

The later decisions on the question of adverse possession citing and approving the case are:

17 Neb., 79. That adverse possession vests title.
18 Neb., 625. As to what constitutes adverse possession.
21 Neb., 683. That adverse possession vests title.
25 Neb., 641. Ditto.
27 Neb., 62. Ditto.
31 Neb., 58. Ditto.
33 Neb., 570. Ditto.

We cite the following from an opinion of the Court in the case of *Horbach v. Miller*, above referred to:

"Now it is said that the elements of all title are possession, the right of possession, and the right of property; hence if the adverse occupant has maintained an exclusive, adverse possession for the full extent of the statutory limit, the statute then vests him with the right of property, which carries with it the right of possession, and therefore the title becomes in him. In *Atkyns v. Horde*, 1 Burr, 119, Lord Mansfield says, that 'twenty-one years is a positive title;' in *Stokes v. Berry*, 2 Salk., 421, it is held that this title will support ejectment; and in *Graffins v. Totenham*, 1 Watts & Sergt., 488, it is said that the effect of the statute is such as to transfer to the adverse occupant the title against which it runs. Gibson, J., says the 'the title of the original owner is unaffected and untrammeled till the last moment, and it is vested in the adverse occupant by completion of the statutory bar; the transfer has relation to nothing which preceded it; the moment of conception is the instant of birth.' Therefore, 'the operation of the statute takes away the title of the owner and transfers it in legal effect to the adverse occupier,' and 'one who purchases the written title

of the owner, buys a title which by operation of law was fairly vested in the adverse occupant.'" *Schell v. The Williams Valley Railroad. Co.*, 35 Penn. State, 204.

"It, however, insisted that there must not merely be possession, but that this possession must be under a claim of right for the whole statutory period. This is true, but the question is, what constitutes such a claim of right? In answer to this, it is only necessary to observe that the rule seems to be well settled that acts of notoriety, and such as building a fence around the land, entering upon the land and making improvements thereon, raising crops and felling trees thereon, are presumptive evidence and evincive of intention to assert ownership over and possession of the property; and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him are competent evidence tending to show ownership. *Elliott v. Pearl*, 10 Pet., 412; *Allen v. Gilmore*, 13 Maine, 178; *Little v. Libey*, 2 Greenleaf, 242; *Miller v. Shaw*, 7 Serg't, and Rawle, 136; *Farrer v. Fessenden*, 39 N. H. 277. Angell on Limitations, Sec. 395. So is possession made out by placing on the premises buildings and receiving the rents and profits thereof. *Poignard v. Smith*, 6 Pick, 177.

"We think that under these rules of law, there was sufficient evidence offered on the trial to submit the case to the jury, to determine as a question of fact, whether the plaintiff in error had maintained his allegations of adverse possession, and the submission of the case to the jury was, under the instructions of the Court, at the request of the plaintiff in error, that if they believed from the evidence that the plaintiff in error, for ten years next before the commencement of the action, was in the actual, con-

tinued and notorious possession of the land in controversy, claiming the same as his own against all persons, they must find for the plaintiff in error; and, furthermore, that enclosing such land within a fence—the maintenance of such fence—cultivation of the land, and payment of taxes on the same for said period, with said intention, is sufficient in law to constitute adverse possession. We are satisfied that under these instructions, the question was fairly submitted to the jury, in accordance with the rules of law above stated, and that in this regard there was no error committed in the court below."

In 17 Neb., 77, *Gatling v. Lane*, Judge Maxwell says:

"Where possession is taken under color and claim of title, and continued for the statutory period, it is not essential that such title shall be valid. It is sufficient if the instrument purports to convey the title to the party in possession. (Cites foreign state cases.) The fact of possession and its character—the occupant claiming to be the owner of the premises—is the test. The possession must be inconsistent with the title of the true owner, and not subject to the rights of other parties. (Cites foreign state cases.) When, however, an occupant has, as in this case, maintained actual, continued and notorious adverse possession of the real estate, claiming the same as his own against all persons for the full extent of ten years, he becomes the actual owner of the same and the rights of the former owner are forever barred. *Horbach v. Miller*, 4 Neb., 32.; *Stokes v. Berry*, 2 Salk., 421; *Graffies v. Tottenham*, 1 W. & S., 488."

The cause reported in 17 Neb. 77, *supra*, was reheard, and in the decision then rendered, Judge Maxwell gives a full review of the law of adverse posses-

sion in this state up to the date of the opinion. *Inter alia*, he says:

"The plaintiff alleges that the tax deed under which the defendant's claim, is void upon its face, and hence is not color of title."

In *McKeighan v. Hopkins*, 14 Neb., 361, it was held that a tax certificate was not sufficient to constitute color of title. The reason was, a tax certificate does not purport to convey title. At the most, it is evidence that the holder or his assignor purchased the real estate described therein at tax sale, and that after the time for redemption has expired if the land is not redeemed the holder will be entitled to a tax deed. An instrument to create color of title must purport to convey the title to the grantee. It is not essential that it do so, however. *Bride v. Watt*, 23 Ill., 507. A tax deed which purports to convey the title to the grantee is sufficient color of title under which open, notorious, exclusive, adverse possession for ten years will operate as a bar, and this, too, although on its face it may fail to recite the place of sale. *McGinnis v. Edgell*, 39 Ia., 419; *Colvin v. McCune*, Id., 502; *Sutton v. Stone*, 4 Neb., 319; *Rivers v. Thompson*, 43 Ala., 633; *Elliott v. Pearce*, 20 Ark., 508. As the defendants have been in the open, continued, and exclusive adverse possession of the premises in question for more than ten years under claim and color of title, the action of the plaintiff is barred. *Grant v. Fowler*, 39 N. H., 101; *Farrar v. Fessenden*, Id., 268; *Elliott v. Pearce*, 20 Ark., 508; *Cofer v. Brooks*, Id., 542; *St. Louis v. Gorman*, 29 Mo., 593.

2. But even if the defendants entered and retained possession of the premises without color of title, still the action is barred. A person who enters upon the land of another with the intention of occu-

pying the same as his own, and carries that intention into effect by open, notorious, exclusive adverse possession of the premises for ten years, thereby dissiezes the owner; and this is so whether the entry and possession are contrary to the will of the owner or not, if the occupant denies the owner's title and claims the land as his own. *Hamilton v. Wright*, 30 Iowa, 480; *Close v. Samm*, 27 Id., 503; *Solberg v. Decorah*, 41 Id., 501; *Yetzer v. Thoman*, 17 O. S., 130; *Tootle v. Ayer*, 8 N. H., 57; *Melvin v. Proprietors*, 5 Met., 15; *Brown v. King*, 5 Id., 173; *Poignard v. Smith*, 6 Pick., 172. No color of title is necessary to constitute an adverse holding. *Campau v. Dubois*, 39 Mich., 247. But one entering upon lands adversely, without any deed or color of title, is restricted to the land actually occupied by him, and is not entitled to go beyond the limits of his actual occupation. *Colburn v. Hollis*, 3 Met., 125; *Jackson v. Schoonmaker*, 2 Johns., 234; *Hale v. Glidden*, 10 N. H., 397; *Ferguson v. Peden*, 33 Ark., 150; *Wilson v. McEwan*, 7 Oregon, 87; *Schneider v. Botsch*, 90 Ill., 577; *Foster v. Letz*, 86 Ill., 412; *Wells v. Jackson Mfg. Co.*, 48 N. H., 491; Woods on Lim. of Actions, 514. It is impossible to harmonize the cases relating to possession without color of title. Many of the older cases, when the statute of limitations was looked upon with disfavor and regarded as a statute of presumptions, seem to hold that to constitute a valid and effectual adverse possession, the possession must have commenced under color of title. Tyler on Adverse Possession, 859, *et seq.*, and cases cited. The statute is now held to be a statute of repose, which is available against the enforcement of stale demands. *Mayberry v. Willoughby*, 5 Neb., 368. The effect of the statute is to quiet titles to real estate, by fixing a time within which the actual

owner must commence his action for the recovery of the estate. If no action is commenced within the statutory period the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner but all the world. *Trim v. McPherson*, 7 Coldw., 15, *Abeel v. Harris*, 11 G. & J., 367; *Cooper v. Smith*, 9 S. & R., 26. And this rule will apply as to the land actually occupied—if the possession was adverse, whether the party held under color of title or not. As the defendants in this case were in actual adverse occupation of the entire lot for more than ten years before the commencement of the action, the action to recover possession of the lot in question is barred.

18 Neb., 625, *Stettnische v. Lamb.*

Opinion by Maxwell:

"The doctrine is now well established that what the law deems a perfect possession, if continued without interruption for the length of time prescribed by the statute for the enforcement of the right of entry is evidence of a fee."

This case also decides that where adverse possession has been begun it will be presumed to have continued until interruption proven, following *Haywood v. Thomas*, 17 Neb., 237.

In 21 Neb., 680, *Parker v. Starr*, Judge Maxwell says, (p. 683):

"The testimony clearly shows that the defendant and those under whom he claims have been in the open, notorious, and exclusive possession for ten years next before this suit was brought after plaintiff attained her majority. Such possession vests a good and sufficient title in the defendant. *Gatling v.*

Lane, 17 Neb., 79-83; *Haywood v. Thomas*, 17 Neb., 240; *Horbach v. Miller*, 4 Neb., 47; *Pettit v. Black*, 13 Neb., 153; *Trussel v. Lewis*, 13 Neb., 417; *Stittnisch v. Lamb*, 18 Neb., 626."

We quote from 27 Neb., 57, *Tourtelotte v. Pearce:*

Opinion by Judge Maxwell.

"It will be observed that the petition fails to allege and the Court to find that the plaintiff has been in the *exclusive* adverse possession of the property in question for any period of time. This defect will be considered waived after judgment where the testimony shows, as in this case, the plaintiff has been in the open, exclusive, and notorious adverse possession of the lots in question for a period exceeding ten years, viz., seventeen years; that he had partly enclosed the same and cultivated them for more than ten years. Leaving out of consideration the fencing, the cultivation of the lots as owner for the statutory period and payment of the taxes thereon are sufficient to constitute adverse possession and pass a good title to the party in possession. The statute is one of repose, and it is safe to assume that any person who claims a title or interest in the land in opposition to that of the party in possession, will assert it within the time fixed by the statute. The security of titles and welfare of society are best promoted by closing the doors of the courts against stale claims which experience has shown spring up at great distances of time when important witnesses are dead, or material evidence is lost or destroyed. These stale claims in many cases are bought up for a trifle, or litigated as a speculation and without any real merit in them. The statute, therefore, was designed to protect the occupant in possession of land as owner, and make his title complete after ten years of such possession.

"The effect of the statute is very clearly stated by Judge Gantt in *Horbach v. Miller*, 4 Neb., 47, quoting from *Graffius v. Tottenham*, 1 W. & S. (Pa.) 488: "That 'the title of the original owner is unaffected and untrammeled till the last moment; and when it is vested in the adverse occupant by the completion of the statutory bar, the transfer has relation to nothing which preceded it; the moment of conception is the instant of birth.' Therefore, 'the operation of the statute takes away the title of the owner and transfers it in legal effect to the adverse occupier'; and 'one who purchases the written title of the owner, buys a title which by operation of law was fairly vested in the adverse occupant.' (*Schall v. The Williams Valley Railroad Co.*, 35 Penn. State, 204.)" And the character of the possession is stated by the same eminent judge as follows: "It is, however, insisted that this possession must not merely be possession, but that this possession must be under a claim of right for the whole statutory period. This is true; but the question is, what constitutes such a claim of right? In answer to this, it is only necessary to observe that the rule seems to be well settled that acts of notoriety, such as building a fence around the land, entering upon the land and making improvements thereon, raising crops and felling trees thereon, are presumptive evidence and evincive of intention to assert ownership over and possession of the property; and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him, are competent evidence tending to show ownership. (*Elliott v. Pearl*, 10 Pet., 412; *Alden v. Gilmore*, 13 Maine, 178; *Little v. Libey*, 2 Greenleaf (Me.), 242; *Miller v. Shaw*, 7 Sergt. & Rawle, 136; *Farrar v. Fessenden*, 39 N. H., 277; Angell on Limitations, Sec. 395.) So is possession made out by placing on the

premises buildings and receiving the rents and profits thereof. *Poignard v. Smith*, 6 Pock., 177; *Gatling v. Lane*, 17 Neb., 77.)"

In the case last cited, it is said (page 83): "The effect of the statute is to quiet titles to real estate by fixing a time within which the actual owner must commence his action for the recovery of the estate. If no action is commenced within the statutory period, the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner, but all the world. (*Trim v. McPherson*, 7 Coldw. (Tenn.), 15; *Abell v. Harris*, 11 G. & J. (Md.), 367; *Cooper v. Smith*, 9 S. & R., 26.) And this rule will apply as to the land actually occupied—if the possession was adverse, whether the party held under color of title or not." In *Stettnische v. Lamb*, 18 Neb., 619, it was held that possession may be tacked where one comes in under the other and the possessory estates are connected and continuous.

In 28 Neb., 70, *Obernalte v. Edgar*, the Court, *inter alia*, decides that the title by adverse possession will reach the boundaries of tract claimed, even though that should include land enclosed by mistake. To the same point is *Levy v. Verga*, 25 Neb., 764.

29 Neb., 261, *Crawford v. Galloway*, seems to be a case where the adverse possessor had no color of title, and was permitted to hold title to whole tract claimed, though on what ground does not clearly appear in the opinion.

(In brief in this case counsel say: "His possession continued as to whole so long as his purpose

was manifested by actual possession of any portion," and cite authorities).

The following is from 31 Neb., 51, *Fitzgerald v. Brewster*:

Opinion by Cobb, C. J.:

"It appears from the whole evidence that the defendant went onto the lots without color of title, and, as he says, without knowing, or in fact pretending to know who owned them, but with the intention of acquiring the title by adverse possession. He knew, or was advised, that ten years' adverse possession would give him the title." * * * *

The judge reviews the decisions of other states as to the necessity of color of title, and finds that nowhere is "honesty of purpose necessary to a disseizin." Following case of *Yetzer v. Thomas*, 17 O. S. 130, and *French v. Pearce*, 8 Conn., 439, he decides the question as follows:

"In our own cases, I think without an exception, the party invoking the protection of the statute, entered and held the premises under color and claim of of title, and yet the writers of the several opinions have in some instances found it more convenient to dispose of the cases upon the holding alone, rather than upon such holding under color and claim of title based upon papers void upon their face; and thus followed the cases of *Yetzer v. Thoman*, *supra*, and *Campau v. Dubois*, 39 Mich., 274, or rather the syllabus of the latter case. Our decisions are in great part based upon the modern view of statutes of limitations, as statutes of repose, rather than of presumption.

"In the case at bar the entry of defendant with

whatever motive, he not acknowledging the title of the plaintiff, amounted to an ouster and disseizin of the plaintiff within the rule of the above cases. His occupation of the premises for the full period of ten years was actual, notorious, adverse, and exclusive, for all of which time the plaintiff failed to assert his title or claim to the property. To hold otherwise than that this occupancy of the defendant ripened into a perfect title, would be, as I conceive, to depart from the letter as well as the spirit of the decisions of this Court from that of *Horbach v. Miller*, 4 Neb., 31, to the latest case, and thus break down a well established rule of property."

Following is from opinion in 55 N. W. R., 962, *Lantry v. Parker*: (Neb., June, 1893).

"This evidence is, we think, sufficient to justify the trial court in finding that defendant had the notorious, continuous, and adverse possession of the land for the statutory period. The law does not require that possession shall be evidenced by a complete foreclosure, nor by persons remaining continuously upon the land, and constantly, from day to day, performing acts of ownership thereon. It is sufficient if the land is used continuously for the purpose to which it may be, in its nature, adapted. In the case of arable land it is not necessary, in order to hold possession, that one should continuously have a crop in the ground. It is sufficient if, during the seasons of the year when crops are grown, the land be used for that purpose, and from harvest to seed time one's possession is not interrupted, although during that period no acts of ownership may be exercised. So, here, we think that the protection of the grass during the growing season, and the cutting, curing, and disposal of the hay at the proper periods, constitue actual possession in the de-

fendant, especially when taken in connection with his using it in like manner as the surrounding land, and his acts to prevent its use by others."

In 33 Neb., 861, *Ballard v. Hansen*, opinion by Maxwell, C. J.

Among the instructions given was this:

"9. The jury are further instructed that adverse possession, as relied upon by the plaintiffs in this action, is the open, actual, exclusive, notorious, and hostile occupancy of land, and claim of right, with the intention to hold it as against the true owner and all other parties, such occupancy, if continuous for ten years, ripens into a perfect title, after which it is immaterial whether the possession be continued or not."

And also the following instruction:

"10. By open and notorious possession is meant such an occupancy as would indicate to a stranger or passer-by that some one was claiming the premises. It would be evidenced by acts of ownership or control, such as making improvements thereon, cultivating the ground, leasing it to others. If you find and believe from a preponderance of the testimony in this case that the plaintiff, either by himself or in connection with his grantors, from whom he procured deeds, giving a color of title as heretofore explained, was in the actual, open, notorious, exclusive, continuous possession of any of the lots in controversy for ten years, claiming to own them and to hold them as against all others, then as to such lots you are instructed the plaintiff acquired perfect title by adverse possession, and as to such lots he is entitled to recover in this action."

The Court said, speaking of all the instructions (p. 866):

"These instructions except in the matter referred

to, seem to state the law correctly, and to most of them no objections were made."

The exception mentioned was the use of the word "hostile," which, as defined by Webster, the Court held inapplicable to modern law of adverse possession.

We believe the citation of the foregoing cases and the presentation of the somewhat extended extracts from the several opinions to be entirely unnecessary in this case, but we have been moved by over-precaution (especially in view of the fact that we have not yet seen the brief of plaintiff in error and have no notice by way of assignment of errors as to what his contentions will be).

In concluding our reference to the Nebraska decisions we call the attention of the Court to the following extract from the opinion of Judge Norval in case of *Meyer v. Lincoln*, 33 Neb., 570, which clearly states the rule established by the decisions in that state:

"By numerous decisions of this Court it has been held that adverse possession of real estate as owner for ten years gives a perfect title to the occupant." *Horbach v. Miller*, 4 Neb., 47; *Gatling v. Lane*, 17 Id., 79; *Haywood v. Thomas*, Id., 240; *Tex v. Plug*, 24 Id., 669; *Levy v. Verga*, 25 Id., 764; *Obernalte v. Edgar*, 28 Id., 70; *Crawford v. Galloway*, 29 Id., 261; *Petersen v. Townsend*, 30 Id., 376; *Alexander v. Wilcox*, Id., 795.

We therefore submit our case, confident that the judgment must be affirmed.

JOHN M. THURSTON,

W. J. CONNELL,

Attorneys for Defendant in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Brief in Reply of Plaintiff in Error.

HUGH C. WARD,
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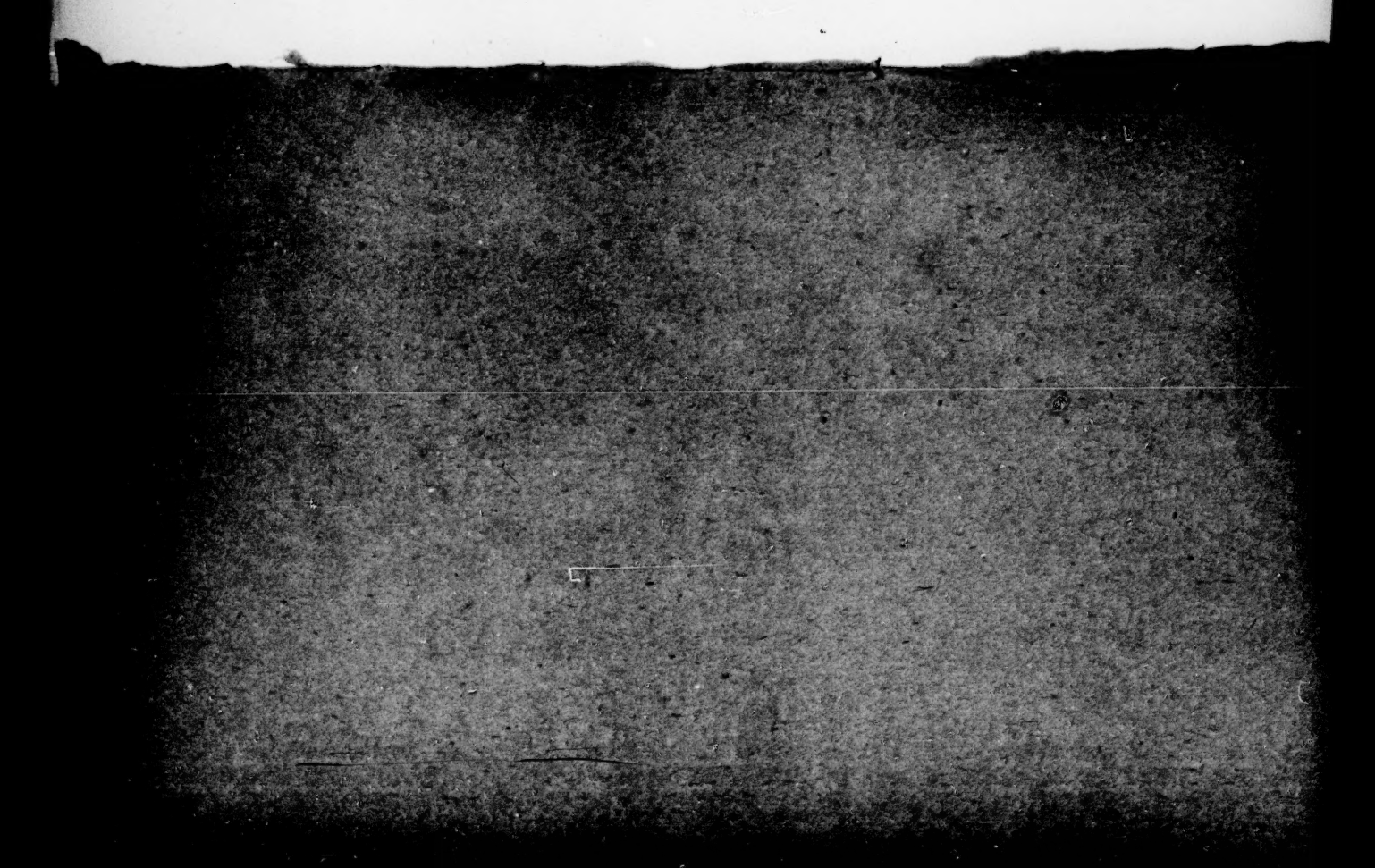

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Brief in Reply of Plaintiff in Error.

I.

The point first made in the brief of counsel for defendant in error, to the effect that no assignment of errors was filed in the court below and none appears in the printed record, is not well taken.

The assignment of errors is set forth in the printed brief of counsel for plaintiff in error, pages 108 to 113, and conforms to the rules and uniform practice of this Court.

This question is authoritatively and conclusively settled by the decisions of this Court in School District of Ackley *vs.* Hall, 106 U. S., p. 428–'9, opinion by Chief Justice Waite, and Grunbel *vs.* Pitkin, 113 U. S., p. 547, opinion by Mr. Justice Miller.

The case cited by counsel for defendant in error (Benites *vs.* Hampton, 123 U. S., p. 519) in no way overrules the foregoing cases and is not applicable to the case at bar, for in that case there was no assignment of errors filed in the court below and none filed in this Court, either in the brief or otherwise, while in this case the assignment or specification of errors is distinctly and clearly set forth in brief for plaintiff in error.

II.

The point in brief of counsel for defendant in error, that the bill of exceptions was not filed in time, is not well taken, and the record conclusively refutes such assumption.

The facts are that the suit was commenced December 4, 1886, and answer filed February 4, 1887, and reply February 7, 1887 (Record, pp. 1, 2, and 3). The law of Nebraska requires two trials in an ejectment suit. In practice the first trial is usually formal, and it was so in this case. On June 8, 1887, stipulation was filed waiving trial by jury for first trial, and on that day formal trial was had and judgment entered for defendant, and at once, on motion of plaintiff, set aside and new trial ordered. (Record, pp. 4 and 5.)

The final trial before court and jury, from which the writ of error in this case is prosecuted, began at November term, 1887, and on the 3d day of December, and was continued

till December 9, when the jury returned their special verdict (Record, pp. 5, 6, and 7). No judgment was entered on this special verdict at that time, and on December 9, 1887, same day verdict was returned, the plaintiff filed motion for new trial, and also motion for judgment notwithstanding verdict. (Record, pp. 8 and 9.)

By stipulation of counsel for respective parties, filed in this cause January 3rd, 1889, it was agreed that the motion for new trial should be continued till January term, at Lincoln, to be heard at some time mutually convenient to counsel, and if not ready, then hearing of motion to be continued till May term, at Omaha, to be heard at a time to be fixed by the court. (Record, p. 9.)

On such stipulation court entered an order that the cause should be heard at January term at Lincoln or May term at Omaha by consent of counsel. (Record, p. 10.)

The motion was not heard at May term.

At the November term, 1889, and on the 5th day of December, 1889, the court heard the motion to set aside verdict and for new trial, and overruled the same, and thereupon on that day entered the judgment from which this writ of error is prosecuted. (Record, p. 10.)

At the November term, 1889, and on December 26, 1889, of said court, an order was entered stating, inasmuch as the bill of exceptions could not be completed at that term that the time for preparing and presenting the bill of exceptions and filing supersedeas bond was extended till February 1, 1890, at which time bill of exceptions might be presented, allowed, signed, and sealed, and said bond approved with the same force and effect as if said action had been had or

taken within the time prescribed by the rules of the court. (Record, pp. 11, 12.)

On January 18, 1890, plaintiff's counsel served written notice with copy of proposed bill of exceptions on defendant's counsel that the bill of exceptions would be presented for the judge's consideration on Monday, January 27, 1890. (Record, p. 11.)

On January 27, 1890, plaintiff filed motion that the bill of exceptions be settled and signed, and alleged that notice thereof, with copy of bill of exceptions, had been served on defendant's counsel. (Record, p. 12.)

Defendant's counsel did not appear, and the court thereupon entered an order reciting that plaintiff had filed the motion asking that bill of exceptions be settled and signed and made part of the record, and that it appeared that by the order of December 26, 1889, time for presenting bill of exceptions had been extended till February 1, 1890, and that defendant had been served with copy of draft of bill of exceptions and notice that same would be presented, and that counsel for defendant was not present, and ordered that the said draft of bill of exceptions be filed with the clerk of the court, and that defendant have thirty days in which to file suggestions of amendments thereto, if he so desired, with the clerk of the court, and that plaintiff have ten days thereafter to reply in writing to such suggestions or amendments. And it was by said order further ordered that this cause be continued till the further order of the court for the purpose of settling, allowing, signing, and filing the bill of exceptions. (Record, pp. 12 and 13.)

The bill of exceptions was filed with the clerk January 27, 1890. (Record, pp. 12, 13, 200.)

Afterwards, on March 18, 1890, the bill of exceptions was settled and signed and filed in the cause. (Record, pp. 14, 200.)

The citation and writ of error were issued, filed, and signed and supersedeas bond approved February 6, 1890. (Record, pp. 13 and 14.)

The certificate of the clerk to the transcript of record is dated May 16, 1890. (Record, pp. 201 and 202.)

From the foregoing statement of the facts relative to the bill of exceptions, it clearly appears that at the term at which the judgment was entered a specific order was made extending the time for presenting, allowing, signing, and sealing bill of exceptions, and within the time fixed the bill of exceptions was served on defendant and presented to the court, and the court ordered it filed and gave the defendant thirty days to suggest exceptions and amendments, and expressly ordered that the case be further continued for the purpose of settling and signing bill of exceptions; and subsequently the bill of exceptions was duly settled, allowed, signed, sealed, and made a part of the record.

The case cited in defendant's brief (Muller *vs.* Ehlers, 91 U. S., 250, 251) is an authority in support and not against the bill of exceptions in the case at bar.

In that case the bill of exceptions was not presented, allowed, or signed until a term subsequent to the judgment, and no order of court extending time was made and no reasons given why the bill was not presented and allowed at the term at which judgment was entered.

In the opinion of Chief Justice Waite in the case cited it is expressly stated that while the rule is that the bill of exceptions must be signed at the judgment term, yet by

express order of court or consent of parties made at the term the time for settling, allowing, and signing the bill can be extended.

In Hunnicut *vs.* Peyton, 102 U. S., p. 357, this Court speaks of the practice of signing bills of exceptions after the term as being quite general and as resting upon the consent of parties or special orders of the Court. That case also holds that suing out writ of error before the bill of exceptions is signed is no waiver of the exceptions, and every right is preserved, for the bill of exceptions when filed relates back to the time when exceptions were actually taken.

That the bill of exceptions was filed in time see—

Ex parte Bradstreet, 4 Peters, 102.

United States *vs.* Breitling, 20 How., 253.

III.

The criticisms of defendant's counsel upon the form of the bill of exceptions are not well taken.

It is true all the testimony is set out, but for the all-sufficient reason that it is necessary this Court should have a full view of the case in order that the errors we complain of may be thoroughly considered. It comes with poor grace from opposing counsel to complain that we have made the bill of exceptions complete when they persistently refused, as shown by the record, to appear before the court and meet us and aid us in preparing a bill in an abbreviated form.

The bill of exceptions, in so far as it relates to the charge of the judge to the jury, complies in every respect with rule 4 of this Court. It specifies with distinctness the parts of the charge excepted to and the legal propositions in the

charge to which exceptions are taken. The bill of exceptions in the case at bar is not like that in Hanna *vs.* Maas, 122 U. S., 24. There the testimony was not embodied in the bill and the exceptions to the charge were not set out.

IV.

Counsel for defendant in error concede in their brief that the judgment was rendered on a special verdict, and erroneously claim that the special verdict finds all the elements of title by adverse possession.

The special verdict does not find that the possession was *actual and exclusive.*

There are vital elements necessary to be affirmatively found.

In addition to the authorities cited in our original brief, we call special attention to the case of Hodges *vs.* Easton, 106 U. S., p. 108, where it was held that judgment could not be rendered on a special verdict which did not cover all the material issues of fact.

One of the grounds on which the decision was based is that the parties to a common-law cause have the constitutional right to trial by jury, which could only be waived under the Federal law by writing, and to render a judgment on a special verdict not finding all the facts would deprive the defeated party of his constitutional right to have a jury pass on all the facts at issue.

V.

In conclusion, we submit, under any view of this case, there is no possibility that defendant can have acquired title by adverse possession.

Flanagan's possession, on which defendant relies, was not adverse to the true owner, but under and in privity with him. If the parol sale was made, then Taylor and others claiming under him held the legal title in trust for Flanagan under an agreement enforceable in equity.

The doctrine of adverse possession is that from the very nature of things the entry on the land or the continuance in possession of the land must be wrongful, which is only another name for adverse.

Where the entry is permissive and under the true owner's and under his agreement to convey, there is no room for the doctrine of adverse possession. If Flanagan's story is true, then from the time of the parol sale Taylor and those claiming under him were trustees for Flanagan and those claiming under him.

The authorities cited in our original brief (pages 150–151) establish that where a trust relation exists or the possession is in privity with the rightful owner that the statute of limitations does not begin to run until the trust relation or the relation by privity ceases. Burnett v. Caldwell 9 Wall 290

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